REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURTS OF COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

AND IN THE

HOUSE OF LORDS:

FROM

HILARY TERM 42 *GEO.* III. 1802,

TO

HILARY TERM 44 *GEO.* III. 1804,

BOTH INCLUSIVE.

With Tables of the Cases and Principal Matters.

By JOHN BERNARD BOSANQUET, of LINCOLN'S INN, Esq. Barrister at Law

and

CHRISTOPHER PULLER, of THE INNER TEMPLE, Esq. Barrister at Law

Ut non difficile sit, quæcunque nova causa, consultationis acciderit, ejus tenere jus. Cic. de Leg.

VOL. III.

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1804.

JUDGES

OF THE

COURT OF COMMON PLEAS

During the Period contained in this Volume.

Right Honourable RICHARD PEPPER Lord ALVANLEY, Lord Chief Juſtice.
Honourable JOHN HEATH, Eſq.
Honourable Sir GILES ROOKE, Knt.
Honourable Sir ALAN CHAMBRE. Knt.

A

TABLE

OF THE

NAMES OF THE CASES

Reported in this Volume.

N. B. *Those Cases, of which the Names are printed in Italics with the Letter n. added to the figures denoting the pages, were cited from MS. notes.*

 Burrell

a 2 Smith

M'Connell

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Forty-second Year of the Reign of George III.

Batten *v.* Harrison Gent. One, &c.

Jan. 27th.

Notice of executing a writ of inquiry on "*Tuesday* the 14th day of *January* instant" when the 14th of *January* fell on a *Thursday*, and on which day the writ of inquiry was executed, the Court of C. B. refused to set aside the execution of the writ of inquiry for this irregularity, but rejected "*Tuesday*" as surplusage, it appearing that the defendant was not misled thereby.

A rule *Nisi* had been obtained, calling upon the Plaintiff to shew cause why a writ of inquiry executed in this cause should not be set aside for irregularity. The irregularity complained of was that the notice of executing the writ of inquiry received by the Defendant was for "*Tuesday* the 14th day of *January* instant;" whereas the 14th of *January* fell on a *Thursday*, and on which day the writ of inquiry was in fact executed. It appeared that on the morning of *Thursday* the 14th the Plaintiff's attorney met the Defendant, who told him that his notice was irregular and he should not attend the inquiry, but did not point out to the Plaintiff's attorney what the irregularity was.

Williams Serjt. now shewed cause against the rule, and contended that the Court would, by rejecting the word "*Tuesday*" as

 surplusage,

1802.
BATTEN
v.
HARRISON.

surplusage, cure the irregularity, and observed that it was not necessary for the Plaintiff to have done more than mention the day of the month, without introducing the day of the week. He cited *Doe d. Duke of Bedford* v. *Kightley*, 7 *Term Rep.* 63. where the Court of *King's Bench* held a notice to quit, at "*Lady-day* which will be in the year 1795," the same being delivered at *Michaelmas* 1795, to be sufficient to support an ejectment, the year 1795 being rejected as impossible.

Clayton Serjt. *contrà* insisted that the Court would not go out of its way to cure an irregularity arising from negligence, and that if they must reject either the day of the month or the day of the week inserted in the notice in order to make it sensible, they would not reject that which would operate as a punishment upon the Defendant who had not been irregular.

Lord ALVANLEY Ch. J. It is clear that the Defendant was not misled by this error in the notice, but that relying on the irregularity he neglected to attend the execution of this writ of inquiry. But though *Tuesday* was by a clerical mistake introduced instead of *Thursday*, yet the notice being for "*Tuesday* the 14th of *January instant*," a given day does seem to be thereby pointed out. The case of the notice to quit appears to me a very strong authority in favour of our rejection of the word "*Tuesday*," and thus making it a regular notice of a writ of inquiry to be executed on the 14th of *January*. Therefore as the Defendant is not stated to have sustained any injury by his non-attendance at the execution of the writ of inquiry, I think it ought not to be set aside.

ROOKE J. (*a*) If it were not for the case of *Doe* v. *Kightley* I should be disposed to listen to the objection taken to the execution of this writ of inquiry, however strict and technical it may be. But since that case the point does not appear to me to be altogether *res integra*, and I think therefore we are warranted in rejecting as surplusage the word "*Tuesday*" in this notice, in the same way as the Court of *King's Bench* rejected an impossible year in a notice to quit in order to support an ejectment. The day of the week need not have been introduced into the notice, and if rejected will leave it a good notice for the 14th of *January*.

CHAMBRE J. I entertain some doubt upon this point. It is certainly of very great importance to parties that they should have

(*a*) Mr. Justice *Heath* was prevented from attending in Court by indisposition until the 9th of *February*.

due

due notice of the time at which their rights are to be discussed; and if the notice given be insufficient they are entitled to avail themselves of that insufficiency. The case of *Doe* v. *Kighley* does not appear to me analogous, because that being a notice to quit it was quite obvious to the tenant that it was given with a view to determine the holding between himself and his landlord from a certain period not arrived at the time of the delivery of the notice, and that therefore the insertion of the past year was a mere mistake. I think however that the notice in this case could not well be understood to be a notice for any other day than the 14th of *January*. Leave out any other word than "*Tuesday*," and the notice will be mere nonsense. If therefore it could not mislead the Defendant and there be no other way of making the notice intelligible than by striking out the word "*Tuesday*," I think the Defendant is not entitled to have this writ of inquiry set aside.

Rule discharged.

DEFFLIS v. PARRY.

Jan. 27th.

If a licence be obtained from the *British* Government by *A.* to import from an enemy's country in six ships such goods as should be specified in his bills of lading; and goods be imported on board one of the six ships on account of *B. C.* and *D.* to whom several bills of lading are sent for their respective goods, and one general bill of lading for the whole cargo be sent to *A.*; the whole cargo will be protected.

THIS was an action on a policy of insurance upon goods on board the *Friendlyke* lost or not lost at and from *Rotterdam* to *London* against all risks, *British* captures included. The declaration, after setting out the policy, and making the usual averments, alleged, that the *Friendlyke* with the said goods on board was captured on the high seas by the *French*; and that at the time of the sailing of the said vessel with the goods on board upon the voyage aforesaid, the Plaintiff had the leave and licence of our Lord the King for bringing the said goods and merchandises in the said vessel from *Rotterdam* aforesaid to *London* aforesaid.

The Defendant having pleaded the general issue the cause came on to be tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Michaelmas* Term, when it appeared that Messrs. *Bridge* and *Smith*, merchants of *London*, on the 21st *February* 1801, obtained a licence from the Crown in the following terms: "*George* the Third, &c. To all commanders of our ships of war and privateers, and all others whom it may concern, greeting: Our will and pleasure is, that you permit Messrs. *Bridge* and *Smith*, or their agents, or the bearer of their bills of lading on board six ships, the names of which they are unable to set forth,

1802.
DEVELIS
v.
PARRY.

the same being *American*, *Prussian*, or belonging to any of the *Hans Towns*, to import without molestation from *Rotterdam*, *Amsterdam*, and *Dort*, to the port of *London*, such quantity of flax, flax seeds, clover and other seeds, madders, *&c.* being *British* or neutral property, as may be specified in their bills of lading, provided the same shall be shipped as aforesaid: this licence to remain in force for the space of six months from the date thereof and no longer: Provided also, that any person who shall claim the benefit of the licence hereby granted, shall take and have the same upon condition, that if any question arise in any of our Courts of Admiralty or elsewhere, whether such person or persons hath or have in all points conformed thereto in all cases whatsoever, the proof shall lie upon the person or persons using this our licence, or claiming the benefit thereof. Given at our Court of *St. James's* the 21st day of *February* 1801, in the 41st year of our reign." That on the 20th of *February* 1801, the Plaintiff having been recommended by Messrs. *Bridge* and *Smith* to Messrs. *James Smith* and Son of *Rotterdam*, wrote to the latter, directing them to purchase some casks of madder; that Messrs. *J. Smith* and Son accordingly did purchase eight casks of madder, the goods insured, and on the 27th of *March* following shipped them on board the *Friendlyke*; the Captain of which vessel signed three bills of lading, whereby he promised to deliver the eight casks of madder to the shippers or their order; that on the same day Messrs. *J. Smith* and Son wrote a letter to the Plaintiff, inclosing the invoice and one of the above bills of lading, indorsed in blank, and apprising him that they had so shipped the goods, and that they should draw for the amount; that on the 24th of *April* following one bill of lading for the whole cargo of the ship *Friendlyke* was signed by the Captain, and indorsed by Messrs. *J. Smith* and Son to Messrs. *Bridge* and *Smith* of *London*, to whom the Captain was addressed, with directions to follow their orders; that Messrs. *J. Smith* and Son drew bills of exchange upon the Plaintiffs for the amount of the goods insured, and remitted them to Messrs. *Bridge* and *Smith*, which bills the Plaintiff afterwards accepted; and that Messrs. *Bridge* and *Smith*, according to the course of trade between themselves and Messrs. *J. Smith* and Son, would, under the general bill of lading of the whole cargo, have withholden the goods for which the Plaintiff held a particular bill of lading, if the Plaintiff had not duly accepted the bills drawn by Messrs. *J.*

 Smith

Smith and Son to anſwer the amount of the goods. The Jury found a verdict for the Plaintiff, but liberty was reſerved to the Defendant to move to have a nonſuit entered.

Accordingly *Lens* Serjt. on this day moved for a rule *Niſi* contending, that the goods infured were not protected by the letter of licence, ſince the Plaintiff, upon whoſe account the goods were ordered, was not to be conſidered as the agent of *Bridge* and *Smith*, or as the holder of their bill of lading; that the bill of lading indorſed by the ſhippers, and ſent to the Plaintiff, veſted in the latter a complete authority to demand the goods; and that the general bill of lading ſent to *Bridge* and *Smith*, which was of a ſubſequent date to that ſent to the Plaintiff, could convey no right to *Bridge* and *Smith* to withhold the goods from the Plaintiff; and that as three bills of lading had been made out according to the uſual courſe reſpecting the goods ſent to the Plaintiff, and only one general bill of lading for the whole cargo, it manifeſtly appeared that the former were the regular bills of lading, whereas the latter was only a fictitious inſtrument for the purpoſe of protecting the property of thoſe who were not within the terms of the licence.

Lord ALVANLEY Ch. J. It appears to me to have been the intention of Government in granting the licence to authoriſe this ſort of importation; the words of the licence are extremely general, but an attempt is now made to confine the terms of it to goods purchaſed for *Bridge* and *Smith* on their own account; but had this been the intention the licence would have been otherwiſe expreſſed. The courſe of proceeding is this: *Bridge* and *Smith* having obtained a licence which is to be in force for ſix months, their correſpondent ſhips a cargo of goods under a general bill of lading to *Bridge* and *Smith*; and with this bill of lading on board no cuſtom-houſe officer would have dared to ſtop them. But then it is ſaid that part of this cargo was not ſhipped on the account of *Bridge* and *Smith*. I have no difficulty however in ſaying, that it was the intention of Government that any goods which ſhould come to this country under their bill of lading, and with their permiſſion, ſhould be protected by the li[illegible]e. I believe it to be within the knowledge of govern[illegible] this ſort of uſe is made of the licences granted to indiv[illegible]als. We are not to conſtrue the acts of Government ſtrictly againſt the merchants; if it had been intended that the licence ſhould have been more confined, I think it would have been ſo expreſſed. It ap-

 pears

1802. DEFFLIS v. PARRY.

pears to me that a fair use has in this instance been made of the licence, the terms of which fully warranted the transaction.

ROOKE and CHAMBRE Js. were of the same opinion.

Rule discharged.

Jan. 28th.

PERCY and Others Administrators of W. HOOK v. POWELL.

The Court will not discharge a defendant out of custody on a common appearance, on the ground of a commission of bankruptcy having been sued out against him by the plaintiff as petitioning creditor upon the same debt as that on which the arrest is founded.

An affidavit to hold bail made by administrators of a person who died before the passing of the Bank act need not negative a tender in Bank notes to their intestate.

Semb. that persons sueing as administrators need not in any case negative such tender to their intestate.

THIS was an application to discharge the Defendant out of the custody of the sheriff of *Middlesex* upon his entering a common appearance. It was moved upon two grounds; 1st, That a commission of bankruptcy had been sued out by the present Plaintiffs as petitioning creditors, founded upon the same debt for which they had now arrested the Defendant; 2dly, That the affidavit of debt which was sworn by one of the Plaintiffs as an administrator, only negatived any tender in bank notes to either of the administrators, but not to the intestate.

Best Serjt. shewed cause, and with respect to the first ground referred the Court to the several cases of *M'Master* v. *Kell*, *ante*, vol. 1. p. 302. *Hill* v. *Reeves*, *ante*, vol. 1. p. 424. and *Oliver* v. *Ames*, 8 *Term Rep.* 364. where applications of this kind had been refused by the Courts on the ground of a want of jurisdiction, saying the Court of Chancery must be applied to for relief; and in answer to the second objection produced an additional affidavit, stating, that the intestate died in 1796, previous to the passing of the Bank act, which first made the negativing a tender in bank notes a necessary part of the affidavit to hold to bail.

Shepherd Serjt. in support of the application urged that the Court would not allow its process to be used for the purpose of harassing a man by two different modes of legal execution, *viz.* an execution against his goods by the commission of bankruptcy, and an execution against his person by arrest, and observed that the case now before the Court was the strongest which could be brought before them; for that though the Court of Chancery will allow a creditor to prove, and then make his election either to proceed under the commission, or at law, provided he wave his proof, yet that Court will not allow a petitioning creditor (in which situation the Plaintiffs stood) the same indulgence, such a creditor being obliged to abide by his proof. He urged on the

second

second objection, that though the intestate was dead so early as 1796, still the Plaintiffs were bound under the provisions of the Bank act to negative any tender to such person.

1802.

Percy and Others v. Powell.

But *The Court* were of opinion, that the first objection was completely answered by the cases referred to, particularly that of *M'Master* v. *Kell*, where the party arresting was as in this case the petitioning creditor, and added that they could not tell but that the Defendant might contest the commission of bankruptcy; the second objection they held to be done away by the fact disclosed in the subsequent affidavit of the intestate's death previous to the passing of the Bank act; and *Rooke* J. added that had that not been the case he should have thought it unnecessary for the Plaintiffs suing in their character of administrators to negative a tender to their intestate (*a*).

Per Curiam, Rule discharged (*b*).

(*a*) It has however been held by the Court of *K. B.* that assignees in an affidavit to hold to bail must negative a tender to the bankrupt before his bankruptcy to the best of their belief. *Martin* v. *Ramet*, 8 *Term Rep.* 455. And indeed the terms of the 38 *Geo.* 3. *c.* 1. *s.* 8. require that the affidavit shall state that *no* offer has been made to pay in bank notes. But it may be observed that an administrator has no means of acquiring even a belief whether a tender was made to his intestate or not, which distinguishes his case from that of an assignee of a bankrupt.

(*b*) In *Oliver* v. *Ames*, 8 *Term Rep.* 364. though the Court of *K. B.* refused to discharge the defendant out of custody on a similar application, yet they suspended the execution of a rule on the sheriff to bring in the body, in order to give the defendant an opportunity of applying to the Court of Chancery.

Hosier and Another Executors of Hosier *v.* Lord Arundell.

Feb. 1st.

An executor cannot join a count upon a bond given to his testator and a count upon a bond given to himself *as executor* in the same action. If a peer be sued by bill no objection can be taken to such proceeding except by plea in abatement. *Quære*, Whether even in that case such an objection could prevail?

Debt on bond. The record stated that the Plaintiffs executors, &c. of *B. Hosier*, &c. came into Court by *P. R.* their attorney, and exhibited their *certain bill* against the Defendant (having privilege of Parliament), the tenor of which bill followed in these words: "To the Justices of our Lord the King of the Bench, *London*, to wit, *John Hosier* and *George Ford*, executors, &c. by *P. R.* &c. complain of *Henry* Lord *Arundell* having privilege of Parliament of a plea that he render to the said *John* and *George*, *as executors* as aforesaid, 364 *l.* of lawful money, &c. which

1802.
HOSIER and Another v. Lord ARUNDELL.

which he *detains*, and the sum of 189 *l.* of like lawful money, which *he owes to and detains* from them, &c." The first count then proceeded as usual as upon a bond for 364 *l.* entered into by the Defendant to the Plaintiffs' testator, and the second count as on a bond for 189 *l.* by the Defendant "to the said *John* and *George* as such executors as aforesaid;" and a breach was assigned to both counts alleging non-payment of the 364 *l.* to the testator in his lifetime, and also non-payment "of the same or the said sum of 189 *l.* or either of them, or any part thereof to the said *John* and *George* executors as aforesaid, or either of them since the decease of the testator." Then followed a *profert* of the bonds, and also of the letters testamentary, and the declaration concluded by praying his Majesty's process to be made to the Plaintiffs as executors against the Defendant according to the form of the statute.

The Defendant craved oyer of the bonds and conditions, which being set forth, the first appeared as stated in the declaration to be a bond for 364 *l.* by the Defendant to the Plaintiffs' testator, with a condition that it should be void on payment of 182 *l.* on a certain day, and the second a bond by the Defendant to the Plaintiffs, executors of *B. H.* in 189 *l.* to be paid to the Plaintiffs, "or their certain attorney, executors, administrators, or assigns," with a condition that it should be void on payment of 94 *l.* 10 *s.* on a certain day. The Defendant then demurred specially and assigned for causes, "that the said Plaintiffs have in and by the said declaration claimed part of the said sum of money therein demanded, as money which the said Lord owes to and detains from them, and other part thereof as money which he is not alleged to owe to, but only to detain from them, thereby declaring against the said Lord as well in the *debet* as in the *debet* and *detinet*, whereas the said Plaintiffs ought to have declared in the *debet* only, or in the *detinet* only: And also for that the said Plaintiffs have attempted to join in their said declaration, and to include in one action two causes of action, which by the laws of this land cannot be joined in one declaration or included in one action. And also for that the said writing obligatory first above mentioned appears to have been made and executed to the said *B. H.* (the testator) in his lifetime; and the said writing obligatory, secondly above mentioned, appears to have been made and executed to the said Plaintiffs themselves; and also for that the said Lord can-

1802.

Hosier and Another v. Lord Arundell.

not plead one plea or use one defence against the said action; and also for that the said plaintiffs have attempted to proceed against the said Lord being a Peer of this realm by bill, whereas they could not by law proceed against him by bill, but only by original writ: And also for that the said declaration is in divers other respects repugnant, insufficient, and informal.

The Plaintiffs joined in demurrer.

Lens Serjt. in support of the demurrer was proceeding to state the points of the case, when he was interrupted by the Court, who expressed a wish to hear the other side, at the same time observing, that they thought the objection to the Defendant being sued by bill could not be taken advantage of in this stage of the proceedings after a full defence made by the words "comes and defends (a) the wrong and injury when, &c." but ought to have been raised by a plea in abatement (b).

Shepherd Serjt. *contrà* contended, that the rule established by the cases was that an executor could not be sued in the same action for a debt owing from his testator, and a debt owing from himself, on account of the different judgments which would follow, *viz.* a judgment *de bonis testatoris*, and a judgment *de bonis propriis;* and insisted, that though he cannot sue on two such causes of action in the same declaration, where in either case the fruits of the action would not be assets, yet that where they would both, as in this case, produce assets to the estate, a debt due

(a) Although in *Wilkes* v. *Williams*, 8 *Term Rep.* 631. the Court of *King's Bench* on the authority of *Alexander* v. *Mawman*, *Willes*. 40. held the words *defendit vim et injuriam quando, &c.* to amount only to an half defence, yet in that case they were prefixed to a plea in abatement, and the principle upon which the Court proceeded was that the *et cætera* should be held to imply an half defence only in cases where such a defence ought to be made, or to imply a full defence where a full defence was necessary. In this case the defendant having demurred to the declaration a full defence was necessary.

(b) See *Lord Lonsdale* v. *Littledale*, 2 *H. Bl.* 267. 299. where it was resolved by the House of Lords that no objection could be taken to a proceeding by bill in *K. B.* against a peer except by plea in abatement. See to this point 2 *H. Bl.* 272. note (a) referring to 7 *H.* 6. 41. But Lord Ch. J. *Eyre* there intimated the opinion of the Judges, that upon such a plea the objection might probably prevail, notwithstanding the cases of *Say* v. *Lord Byron*, *Sayer* 63., and *Gosling* v. *Lord Weymouth*, *Cowp.* 844. where the contrary had been ruled. In *Dawkins* v. *Burridge*, 2 Lord *Raym.* 1442. 2 *Str.* 734. *S. C.* it was determined that under the Stat. 12 & 13 *W.* 3. *c.* 3. *s.* 2. the Common Pleas might hold plea by original bill against a member of the House of Commons, though that Court had no power to proceed by original bill at common law. But the Stat. of *W.* 3. does not empower any court to proceed by original bill against Peers or Lords of Parliament. See the argument of Mr. Serjt. *Williams* in *Lord Lonsdale* v. *Littledale*, 2 *H. Bl.* 273, 274. and the first reason assigned in support of the errors in the House of Lords, *S. C.* 2. *H. Bl.* 299, 300, 301.

 to

1802.

HOSIER and Another v. Lord ARUNDELL.

to the executor and a debt due to the testator might be joined, and for this he cited *King* and others executors of *Stevenson* v. *Thom*, 1 *Term Rep.* 487. where the first count of a declaration, in an action against the acceptor of a bill of exchange indorsed by the payee to the Plaintiffs, who were the surviving executors of *Stevenson*, "in right of the Plaintiffs as surviving executors as aforesaid," joined with two other counts, the one for money had and received to the use of the Plaintiffs as executors, and the other on an account stated with the Plaintiffs as executors, was holden good on demurrer: he observed that in that case the argument in support of the demurrer had proceeded on the ground of the promise being improperly laid, the indorsement to them as executors not being a good consideration for an assumpsit to them as executors, but for an assumpsit to them in their own right, and yet *Ashhurst* J. said they held the bill as executors, and might declare upon the right in which they held it; and *Buller* J. observed, that though a Plaintiff cannot join two counts, one on a debt due to himself, and another to him in the character of executor, yet that the only question was whether the sum when recovered would be considered as assets of the testator.

Lord ALVANLEY Ch. J. Admitting that where the fruits of a judgment go altogether as assets into the Plaintiff's hands, two causes of action may be joined, *viz.* one to the executor strictly as executor, and the other on a promise made to him after the death of his testator, still in this case if the present Plaintiffs happen to die intestate before the debt due on the bond entered into with them in their own name is recovered, it cannot be contended that the administrator *de bonis non* will be able to put that bond in suit. In such case the administrator of the estate of the surviving executor would be the person on whom the right of action arising out of the bond would unquestionably devolve. The Plaintiffs are described in the bond to be the executors of *Benjamin Hosier*, and the money is to be paid to them "their certain attorney, executors, administrators, or assigns." There is indeed another reason why this declaration should not be supported, *viz.* that the costs cannot be severed, and that the Plaintiffs for the cause of action stated in the second count would be liable to pay costs, whereas for that stated in the first they would not be liable, because suing strictly as executors. If it were otherwise the Plaintiffs' right as executors to retain might be affected; for the right to retain

accrued

accrued to them on taking this bond, which was *quoad* the testator's debt a payment; but if the bond could be put in suit by the administrator *de bonis non* of *Benjamin Hosier*'s estate, their representative would be deprived of his right to retain.

ROOKE J. Where executors change the nature of the debt due to their testator after their testator's death, they must sue for the new debt in their own name, and not in their character of executors. If these Plaintiffs had failed they would not have been liable to costs on the first count, but on the second they would, because in the one they sue as executors of the obligee of a bond, in the other as obligees themselves of a bond. Indeed this case falls within the words used by Mr. Justice *Buller* in *King* v. *Thom*, "it is clear that a Plaintiff cannot join two counts, one on a debt to himself, and another to him in the character of executor." To the second count of this declaration it is quite clear that the defendant could not have pleaded that the Plaintiffs were not executors.

CHAMBRE J. If executors take a note or bond from a creditor to the estate of their testator, the old debt is thereby extinguished, and a new one created, which must be declared upon as such. The case of *Betts* v. *Mitchell*, 10 *Mod.* 315. is in point. There the Plaintiff declared upon several promises made to his testator, and also on a promissory note to himself *ut executori*; and it was insisted, that the last count could not be joined with the former ones, the words *ut executori* being only a description of the Plaintiff's person, whereas the note was made to him, and transferable by his indorsement, and would go to his administrator, and not to the administrator *de bonis non*; and this reasoning was adopted by the Court, who gave judgment for the Defendant on demurrer to the declaration. There is also a case of *Rogers* v. *Cook*, 1 *Salk.* 10. where the reason given why a cause of action in the testator's time, and a cause of action in the executor's time, cannot be joined, is that the costs are entire and cannot be severed. The debt created by the second bond is a debt to the Plaintiffs themselves, and will devolve on their representative, though whatever they recover they must hold as trustees for the estate of their testator.

Shepherd then applied for leave to amend.

But *The Court* said this was not a case in which they ought to depart from the general rule, that after argument amendments are

1802.
Hosier and Another v. Lord Arundell.

not allowed, particularly as the record would still be open to the objection of its being a proceeding against a Peer by bill (a); and indeed in case of amendment the declaration would be as a declaration *de novo*, and consequently the defendant at liberty to plead in abatement to the jurisdiction.

Judgment for the Defendant.

(a) Mr. Justice *Chambre* observed that in *Hargrave's* Law Tracts (see discourse by Sir *Matthew Hale* concerning the Courts of *King's Bench* and *Common Pleas*, c. 5. p. 363.) several precedents of proceeding by original bill are mentioned of a date as early as *Edward* 3d. To this observation it may be added that upon investigation two of those instances turn out to be proceedings by original bill in the Court of *Common Pleas*. See *T.* 31. *Ed.* 3. *Fitzh. Ab. Bill.* 11. and 30 *Ass.* pl. 14. *Bro. Abr.* pl. 20. From the instances collected in the above chapter Sir *Matthew Hale* infers that the Court of *King's Bench* formerly took cognizance by original bill of all matters whereof it could take cognizance by original writ. But it may be observed that many of the cases appear to have been contempts of the Court, such as obstructing the person of a Defendant in his way to make his defence to an action then pending; in which case either Court may take cognizance of the matter by bill, even though it arise in a foreign county; for, says *Skipwith*, *T.* 31. *Ed.* 3. *Fitzh. Ab. Bill.* 11. "when a party is here pleading he is in the protection of the law," and on the same principle 42 *Ass.* pl. 28. a man was sued by bill for beating a woman in *curiâ regis*, and another in 22 *H.* 6. 24. for maintenance in the presence of the Court. Indeed 42 *Ass.* 11. also cited by Sir *Matthew Hale*, appears to be incorrectly cited, for the Court there held that bill for an escape against an officer could not be maintained. So 17 *Ass.* 5. was an appeal of robbery. The remaining precedents are too indistinctly reported to afford any satisfactory conclusion whether or not they were proceedings by bill in cases of contempt or privilege, or under what circumstances. This at least is remarkable, that early in the ensuing reign, see *Fitz. Ab. Bill* 9. *M.* 1. *R.* 2., a question arose whether under the circumstances of the case a party was sufficiently in *custodiâ marescalli* to be proceeded against by bill; which discussion seems to have been unnecessary if the party whether in *custodiâ* or not might still be proceeded against by original bill. And similar questions appear to have arisen in 7 *H.* 6. 41. 9 *Ed.* 4. 2. and 9 *Ed.* 4. 12. To this it may be added, that it has been said if a man be in the Fleet, a Plaintiff may have a bill of debt against him, in the same manner as he can in the *King's Bench* against a man in the custody of the Marshal. *Fitz. Ab. Bill* 18. 3 *H.* 6. 26.; though *Fitzherbert* adds that it was not usual.

Feb. 2d.

TALMASH *v.* PENNER.

After plea pleaded the venue cannot be changed. But if the Defendant plead pending a rule *Nisi* for changing the venue, the Court will notwithstanding allow him to change the venue.

THE Defendant in an action of assault and battery having obtained a rule *Nisi* for changing the venue from *London* to *Surry*, afterwards pleaded the general issue.

Shepherd Serjt. in shewing cause against the rule insisted, that the Defendant by pleading to the declaration in *London* had waved

his

1802.

TALMASH v. PENNER.

his right to change the venue, and referred to a case of *Leir* v. *Williams*, *Mich.* 1800, in this Court as in point.

Lens Serjt. *contrà* admitted, that if the Defendant had obtained time to plead upon the terms of taking short notice of trial for *London* or *Middlesex*, he would thereby have waved his right to change the venue (*a*), but insisted that the Defendant had waved nothing by pleading in the regular way, since his act could not be considered as voluntary; for if he had omitted so to do, the plaintiff would have been entitled to sign judgment.

The Court said, that strictly speaking the defendant had waved his right; for by pleading the general issue he had put himself upon the country, that is a jury of the county in which the action was brought, *viz.* of the city of *London* (*b*); but that as it appeared clearly from the plea having been put in pending the rule for changing the venue, that the defendant must have so pleaded from inadvertence, they would allow the venue to be changed, and the plea to be amended by altering the name of the county, upon payment of costs; and they cited a case of *Herbert* v. *Flower*, *Barnes* 492. *Ed.* 3. where the same indulgence was granted upon the same grounds.

(*a*) See *Tidd. Pr.* 364. ed. 1. 528. ed. 2. and *Shipley* v. *Cooper*, 7 *Term Rep.* 698.

(*b*) Indeed the venue cannot be changed at the instance of the defendant after plea pleaded, even though he afterwards obtain leave to withdraw his plea and plead it *de novo* with a notice of set-off, *Palmer* v. *Turner*, *H.* 26 *Geo.* 3. *Tidd. Pr.* 364. ed. 1. 528. ed. 2.

ABBOTT v. RAWLEY.

Feb. 3d.

If proceedings be commenced upon a recognizance of bail immediately upon the return of the *ca. sa.*, the Court will not stay them but upon payment of the costs, though the principal be surrendered within the four days allowed by the practice of the Court.

THIS was an application to stay proceedings, in an action against bail on the recognizance, on payment of the debt and costs, the Defendant in the original action having been rendered within the four days allowed by the practice of the Court, but after the return day of the *ca. sa.*, and the Plaintiff having commenced his proceedings against the bail immediately after the return day.

Onslow Serjt. opposed the rule being made absolute, unless upon payment of the costs incurred in the action against the bail, and cited *Perigale* v. *Mellish*, 5 *Term Rep.* 363. in which the Court of *King's Bench* refused to stay proceedings against the bail upon payment of debt and costs in the original action, unless the Defendant would

1802.

ABBOTT v. RAWLEY.

would alſo pay the coſts in the action againſt the bail, though the latter action was commenced within the eight days allowed by the practice of the Court for the bail to ſurrender the principal. He obſerved that there was a diſtinction between ſuing by *ſcire facias*, and bringing an action on the recognizance, no coſts being allowed in the former caſe unleſs the bail appear and plead or join in demurrer (*a*), whereas in the latter they are allowed.

Shepherd Serjt. *contrà* inſiſted, that as the bail had ſurrendered within the time allowed by the practice of the Court, they were perfectly regular, and ought not to be called upon to pay the coſts of the action in the recognizance; that in fact both parties were regular, the Plaintiff having a right to commence proceedings on the recognizance upon the body not being brought in at the return day, and the bail having a right to ſurrender the principal within the four days after.

The Court ſaid, that though the render within the four days was *ex gratiâ*, ſtill it muſt be admitted that the Plaintiff had a right to bring his action on the recognizance of bail, and conſequently the bail had no right to ſtay the proceedings in that action without paying the coſts.

Rule abſolute on payment of the coſts of the action on the recognizance, as well as of the debt and coſts in the original action.

(*a*) 2 *Tidd. Pr. K. B.* 1018. ed. 2.

Feb. 5th.

STRONG *v.* SIMPSON.

In an action for breach of a contract to deliver goods at a certain price *per* ton, the Court will not allow the Defendant to pay money into Court.

THIS was an action of aſſumpſit in which the declaration ſtated, that in conſideration that the Plaintiff had bought of the Defendant a certain quantity of potatoes at a certain price *per* ton, the Defendant undertook to deliver the potatoes at the price aforeſaid, and that the Defendant had neglected ſo to do, whereby the Plaintiff had been injured. The Defendant paid money into Court, upon which a rule *Niſi* was obtained for diſcharging the rule to pay money into Court.

Beſt Serjt. ſhewed cauſe and contended, that the Court ſometimes allowed money to be paid in, though the damages were not liquidated, as in *Hutton* v. *Bolton*, 1 *H. Bl.* 299. *in notis*, and *Yate* v. *Willan*,

Willan, 2 *East*. 128. which were actions against common carriers, and also in actions upon policies of insurance where the damages are altogether unascertained.

Shepherd Serjt. *contrà* insisted, that money can never be paid into Court but where the damages are mere matter of computation, as was laid down by Lord *Mansfield* in 2 *Burr.* 1120.; therefore it had been disallowed in actions for dilapidations, *Squire* v. *Archer*, 2 *Str.* 906. and *Salt* v. *Salt*, 8 *Term. Rep.* 47. and that in *Griffith* v. *Williams*, 1 *Term. Rep.* 710. which was an action against an attorney for neglecting to enter up judgment on a warrant of attorney, the Court thought that the payment of money into Court was originally irregular, though as the Plaintiff had taken it out he was precluded from objecting to the irregularity; that with respect to *Yate* v. *Willan* the only question there made related to the effect of the payment in admitting the contract; and that the distinction respecting actions against carriers is this, that if there be an agreement to be liable to a specific sum that sum may be paid into Court, but not otherwise, as was settled in *Fail* v. *Pickford*, *ante*, vol. 2. p. 234. where the Court refused to allow a carrier to pay into Court the invoice price of goods lost, there being no agreement that the carrier should be liable to that extent.

The Court said that money could not be paid into Court in such a case as this without violating every rule of practice upon the subject: that the value of the goods was not the criterion of the Plaintiff's damage, but that the declaration sought a compensation for the breach of a specific agreement, and that money might as well be paid into Court in an action for a breach of a promise of marriage.

And CHAMBRE J. added that he doubted much of the propriety of extending the rule respecting the payment of money into Court, since it transfers the risk of the costs from the party who is originally to blame, to the party who is not to blame.

Per Curiam, Rule absolute.

1802.

Feb. 5th.

If a testator having executed a devise of lands in the presence of three witnesses to the persons as joint tenants in fee, afterwards strike out the name of one of the devisees and there be no re-publication, the erasure will only operate as a revocation of the will *pro tanto.*

Larkins and Others *v.* Larkins and Others.

The following case was sent by the Master of the Rolls for the opinion of this Court.

William Larkins Esquire deceased, by his last will and testament bearing date the 3d day of *July* 1794, duly executed and attested in the presence of three witnesses, and as by law is required for devising freehold lands (amongst other things) gave and devised as follows: " I give, devise, and bequeath all my freehold messuages or tenements and hereditaments situate at *Calcutta* (a) aforesaid, with all and every the rights members and appurtenances thereto belonging unto my brother *John Pascall Larkins,* and to my good friend *Samuel Enderby the younger* of *Aldermanbury* in the city of *London,* Esquire, and *George Smith of Lincoln's Inn, in the county of Middlesex Esquire,* their heirs and assigns upon trust, that they or the survivor of them, or the heirs or assigns of such survivor do and shall so soon after my death as conveniently may be sell and dispose of my said freehold messuages and hereditaments at *Calcutta* aforesaid, either together or in parcels, by public auction or private contract, and for such sum and sums of money and in such manner as they my said trustees or the survivors or survivor of them, or the heirs or assigns of such survivor shall think proper and most advantageous: And my will is and I do hereby declare and direct that upon every or any such sale or sales the receipt or receipts of my said trustees or the survivor or survivors or the heirs or assigns of such survivor shall be a good and sufficient discharge or good and sufficient discharges to the purchaser or respective purchasers of my said freehold messuages or hereditaments or any part thereof for his, her, or their purchase money or respective purchase money, or so much and such part thereof as in such receipt or receipts shall be expressed to be received, and that such purchaser or purchasers or any or either of them shall not be obliged to see to the application of his, her, or their purchase money, nor shall they or any or either of them be answerable

(a) On the suggestion of Lord *Alvanley* Ch. J. " *Middlesex*" was by consent substituted for " *Calcutta*" wherever it occurred in the case, his Lordship observing that possibly the statute of frauds might not extend to our *Indian* possessions, and that there might be some *lex loci* of which the Court were ignorant.

anſwerable or accountable for the miſapplication or nonapplication thereof or of any part thereof: And my will is, and I do hereby declare and direct, that the money to ariſe by ſale of my ſaid freehold meſſuages and hereditaments at *Calcutta* aforeſaid, after payment of the charges and expences attending ſuch ſale, and alſo the rents iſſues and profits thereof until the ſame ſhall be ſo ſold, ſhall be deemed and conſidered as part of the reſidue of my eſtate and effects, and go therewith as hereafter directed." And the teſtator, after giving divers annuities and bequeſts, then gave the reſt and reſidue of his eſtate and effects whatſoever and wherеſoever, whether real or perſonal, unto the ſaid *John Paſcall Larkins*, *Samuel Enderby the younger*, *and George Smith*, their heirs, executors, adminiſtrators, and aſſigns for ever, upon certain truſts in the will ſet forth. And concluded thus: "And laſtly, I do hereby nominate and appoint my ſaid brother *John Paſcall Larkins* and the ſaid *Samuel Enderby the younger and George Smith*, together with the ſaid *Mary Ann Larkins* my ſaid brother's wife, and the ſaid *Mary Cuming and Henrietta Sampſon*, guardians of my ſaid daughters during their reſpective minorities: And I do hereby alſo nominate and appoint my ſaid brother *John Paſcall Larkins*, the ſaid *Samuel Enderby the younger*, *and George Smith* executors of this my laſt will and teſtament.

The teſtator had no other real eſtate, than the meſſuage and hereditaments at *Calcutta* in the will mentioned, and the deviſes above ſet forth are all that the ſaid will contains relating to land, the other parts of the will relating merely to perſonal eſtate.

After the teſtator had duly executed the ſaid will, he with his own hands ſtruck out by drawing a pen through them the ſeveral words and paſſages hereinafter mentioned (that is to ſay), in the deviſe of the freehold meſſuages at *Calcutta* to the ſaid *John Paſcall Larkins*, *Samuel Enderby* the younger of *Aldermanbury*, in the city of *London*, Eſquire, and *George Smith* of *Lincoln*'s Inn, in the county of *Middleſex*, Eſquire, the words "the younger" and "*George Smith* of *Lincoln*'s Inn in the county of *Middleſex* Eſquire," were ſtruck out by a pen drawn through them. And in the ſaid bequeſt of the reſt and reſidue of the real and perſonal eſtate to the ſaid *John Paſcall Larkins*, *Samuel Enderby* the younger, and *George Smith*, the following words, "the younger" and "*George Smith*, their heirs, ex," were ſtruck out, but over the words "heirs, ex" was written the word "*ſct.*" And in the clauſe appointing guardians the following words, that

1802.

Larkins and Others v. Larkins and Others.

is to say, "the younger," and "George Smith," and the words "Henrietta Sampson," were struck out. And in the last clause appointing executors, the following words, viz. "the younger," and "George Smith," were also struck out; and all the above alterations were made by the testator himself, by drawing the pen through the above words. Other parts of the said will were also altered in the same manner by striking out different passages thereof, but such alterations relate only to the testator's personal estate. The said testator never in any manner re-executed, or republished his said will after making the above mentioned alterations. At the time when the said will was executed, the said George Smith the younger had a father living, George Smith the elder, who died before the time when the above mentioned alterations were made.

The question for the opinion of the Court was, Whether the devise of the estate at Calcutta to the trustees named in the said testator's will to be sold, were revoked by the testator's having struck out the name of George Smith, one of such trustees, after the execution of his said will?

Best Serjt. for the Plaintiffs. The question to be considered is, Whether by striking out the name of *George Smith*, one of the trustees, the testator revoked the devise of his lands in *Calcutta* altogether, or whether he only revoked it *pro tanto*? That the intention of the testator was merely to revoke the trust estate devised to *G. Smith* is most manifest, for in that part of the will where his pen had accidentally gone too far and erased the word "heirs" and the two first letters of the word "executors," which were to enlarge the estate of the two other trustees, he wrote over the erasure "*stet*," thereby plainly expressing his intent that they should retain the estate he had given them before the erasure took place. In *Sutton* v. *Sutton*, *Cowp.* 812. where the testator after devising all his lands upon trust to sell, "except the house at *Bath*," gave to his wife "his house in *Bath* for her life and after her death to his eldest son," and after the execution of the will sold his house at *Bath*, and struck out of his will the exception and the devise respecting it, the devise to the trustees was nevertheless held not to be revoked. There were several other alterations and obliterations in that will, especially one whereby in the declaration of the trusts the testator altered an annuity of 50*l.* to his wife to 450*l.*; but the Court of *King's Bench* avoided giving any opinion respecting the distribution of the funds arising from the estates when sold, only deciding that the devise to sell remained in force. A

1802.

LARKINS and Others v. LARKINS and Others.

revocation effected by erasure or alteration can be extended no further than it appears to be the intention of the testator that it should operate. The statute of frauds 29 *Car.* 2. *c.* 3. *f.* 6. enacts, that no devise in writing of lands, &c. nor any clause thereof shall be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself or in his presence, and by his direction and consent. The object of this provision was that where a testator has expressed a clear intention by writing, that intention should not be superseded by any thing but a clear act of the testator manifesting an intention to revoke. The act therefore must appear to be done *animo revocandi*: and the effect of the act can extend no further than such an intention appears. If it were otherwise all that mischief would arise which the act was intended to prevent. In *Humphreys* v. *Taylor*, *H.* 25 *Geo.* 2. *in Canc.* 5 *Bac. Abr.* tit. *Wills and Testaments*, *G.* p. 535. *fol.* ed. it was decided that "if *A.* by his will devise all the residue of his personal estate to *B.* and *C.* and make them executors, and after by a codicil cancel and revoke every legacy, thing, and part relating to *B.*, and revoke his being executor, *C.* shall have the whole; for a revocation without a new gift shall have the same effect as if it had been expressly given: and whether it be by codicil or obliteration it is the same." In *Lamb* v. *Parker*, 2 *Vern.* 496. Lord Keeper *Wright* says, the rule where a subsequent act shall amount to a revocation by implication, is, that such implication must be necessary and wholly inconsistent. So in *Com. Dig.* tit. *Devise*, F. 2. it is laid down, that a revocation of that part of a will by which two out of four trustees are named, and an appointment of two new trustees only amounts to a revocation of the two trustees and constitutes two others in their stead. The case of *Hyde* v. *Mason*, 5 *Bac. Abr.* tit. *Wills and Test*, *G.* p. 540. *Vin. Abr.* tit. *Devise*, *R.* 2. pl. 17. is also a very strong authority to shew that obliteration unless done *animo revocandi* will not amount to a revocation of the will. The testator in that case having executed two duplicate wills and delivered one to his executor, afterwards made great alterations in that which he retained, and wrote out a fair copy including the alterations, which he never executed; and it was held that the alterations did not amount to a revocation of his will, but only shewed an intention to make another, which intention never having been carried into effect the will remained in force.

Shepherd

1802.

LARKINS and Others v. LARKINS and Others.

Shepherd Serjt. *contrà*. Particular modes of revoking a will of lands or any clause thereof having been pointed out by the statute of frauds, the Court cannot inquire what was the intention of the testator in obliterating certain parts of his will, unless he has pursued the directions of the statute. Now by the statute two sorts of revocation are allowed; first, a revocation by the mere act of the party without any witnesses, as tearing, cancelling, or obliterating; and secondly by executing a new will in the presence of three witnesses, inconsistent with the bequests of the former will. Now the revocation in the present case, if good, will in effect operate as a new devise, and yet the new devise will not have been executed according to the provisions of the statute. It is true, that if this were a devise of personalty it would be different; for in that case no attestation is necessary, any writing which amounts to evidence of a new gift being sufficient to pass that species of estate. In the case therefore of *Humphreys* v. *Taylor* the devise being of personalty the decision is no authority in the present instance. With respect to *Hyde* v. *Mason* the Court did not decide that the devisees took as under a new bequest, but only that the devisor having an intention to revoke had not carried that intention into execution, and therefore they decreed in favour of the duplicate which had not been obliterated, without engrafting upon it any of the intended alterations. In the case cited from *Com. Dig.* it does not appear whether the will subsequent to the revocation of two trustees, and appointment of two new trustees, were re-executed according to the statute of frauds or not: consequently it cannot be inferred from thence that merely striking out the name of one of three trustees without a new execution of the will is only a revocation *pro tanto*; for if the will subsequent to the revocation and appointment were re-executed according to the statute of frauds, most clearly the old will was from that moment annulled, and a new one created. If indeed there be two distinct devises to different persons in one will, and the testator afterwards revoke one of them, it is not contended that it would also revoke the other: such devises being as entirely independent of each other as two different wills (*a*). But if a man devise the same estate to two persons, and afterwards revoke that devise as to one, such revocation necessarily alters the estate of the other

(*a*) See *Burkitt* v. *Burkitt*, 2 *Vern.* 498. where an erasure of certain legacies in a will was held not to affect the devise of a copyhold estate to the testator's wife.

by enlarging it, and if it can operate at all must operate as a new gift. Whatever alters either the quantity or quality of the estate of the devisee must be considered as a new devise: as if the testator after giving by his will an estate to *A.* his heirs and assigns, should afterwards strike out the words "heirs and assigns" *A.* could not take an estate for life unless the will were re-executed. It is also material to attend to the language of the statute of frauds, which speaks of the revocation of a will or any *clause* thereof, not of any part thereof: from which it may be inferred that a revocation must either be of the whole will or of some clause thereof: and that if any thing be done by the testator amounting to a revocation of any part of a will, it cannot operate upon less than upon the whole clause to which it relates. As to the case of *Sutton* v. *Sutton* it cannot affect this: for the testator, in that case in fact revoked nothing. Having devised all his lands to trustees except his house at *Bath*, which he devised to his wife, he afterwards sold his house at *Bath*, and then struck the exception and devise to his wife out of his will: but the interest of the devisee was not affected, nor was the operation of the remainder of the clause in any degree altered by that act.

1802.

LARKINS and Others v. LARKINS and Others.

Lord ALVANLEY Ch. J. I have no doubt upon this case. A revocation by obliteration will have the same effect which a revocation by any other means will have, and no more. I lay out of the case the consideration of the devisees being trustees, for in a court of law they must be considered as joint tenants in fee absolutely. Now it is argued, that the revocation of the devise as to one devisee makes an alteration in the interest of the others. But whatever this alteration be it is not an alteration arising from a new gift, but merely from a revocation. If the remaining devisees were to acquire any estate which they had not before, something beyond a mere revocation would be necessary. If therefore the devisees had been tenants in common, upon the erasure of one name the remaining two would take no more than two thirds of the estate.

ROOKE J. It is rather extraordinary that this point should now come to be decided for the first time; but though the point be new I entertain no doubt that the erasure of the name of *George Smith* is to be considered as a revocation of the devise *pro tanto* only.

1802.

LARKINS and Others v. LARKINS and Others.

CHAMBRE J. It would be most unreasonable to defeat the intention of a testator so plainly expressed as it is in the present case; and before we could come to such a decision I should expect authorities to be cited previous to the statute of frauds. For the revocations enumerated in the statute were revocations at common law, and stand upon the same footing as if that statute had never passed, it being declared that the restrictions introduced by that statute should not extend to those revocations. The only argument of any weight which has been used is, that the remaining devisees take a larger interest. But that argument does not apply here; for the devisees being joint tenants are seized *per my et per tout*; and if one joint tenant die in the life of the testator the other joint tenant takes the whole of the estate, though it never vested in him during the life of the testator, the reason of which is that the original devise is sufficient to pass the whole interest. The case of a tenant in common is indeed different, he being only seised of an undivided moiety. The effect of this act of obliteration, as it appears to me, is to take away that from *G. Smith* which the testator at first intended to give him. I cannot entertain a doubt upon the subject; and indeed the authorities cited are all one way (*a*).

(*a*) The certificate was not prepared when this case was printed.

Feb. 5th.

DOE ex dim. WALKER v. STEVENSON.

Ejectment in C. B. and verdict for the Plaintiff and costs paid by Defendant, who then brought an ejectment in K. B. for the same premises and recovered, but was not paid his costs; and now a third ejectment being commenced here, by the Plaintiff in the first ejectment, the Court stayed proceedings till payment of the costs of the second ejectment in K. B.

THIS was an application to stay proceedings in an action of ejectment, until the costs of a former ejectment were paid.

It appeared that the lessor of the Plaintiff had brought a former ejectment in this Court, upon which he had recovered and received the costs; that the Defendant then brought another ejectment in the *King's Bench* and recovered, but had not received the costs; after which the lessor of the Plaintiff brought this third ejectment.

Shepherd Serjt. resisted the application, and insisted, that although the Court will not suffer a person who has failed once as lessor of the Plaintiff to bring a second ejectment without paying the costs of the suit, yet that the rule did not apply to a second

ejectment

1802.

Doe ex dim. Walker v. Stevenson.

ejectment brought by a person who had before failed as a defendant, and who therefore is not to be considered as twice making himself an actor.

Vaughan Serjt. in support of the application said, that the point had already been decided in *Thrustout d. Williams* v. *Holdfast*, 6 *Term. Rep.* 223.

The Court thought that the principle of the rule extended as well to cases where a person improperly defends an ejectment, as where he improperly brings one, and therefore made

The rule absolute (*a*).

(*a*) The practice of the Courts of *King's Bench* and *Common Pleas* as to staying proceedings in actions of ejectment till payment of the costs of a former ejectment on the same title corresponds. See the cases collected *Hullock's* Law of Costs from p. 445. to 467. And indeed where the same title is in issue, the above practice prevails though the ejectment be for different lands in a different county, and a new Defendant be added. *Keene d. Angel* v. *Angel* and Another, 6 *Term Rep.* 740. and though the former ejectment was brought by the father of the lessor of the Plaintiff against the father of the Defendant. *Doe d. Feldon* v. *Roe*, 8 *Term Rep.* 645. But the practice of the two Courts as to staying proceedings in other actions by the same Plaintiff for the same cause, seems to differ thus far, that the Court of *K. B.* stays proceedings till the costs of the former action are paid wherever the Plaintiff's proceedings appear to be vexatious, but the Court of *C. B.* never interferes unless the merits of the case have been tried in the former action. See *Weston* v. *Withers*, 2 *Term Rep.* 511. *Moulton q. t.* v. *Bingham*, and *Baldwin* v. *Richards*, 2 *Term Rep.* 511. *n. a.* for the practice of *K. B.* and *Cox* v. *Chubb*, 2 *Bl.* 809. and *Cooke* v. *Dobree*, 1 *H. Bl.* 10. for the practice of *C. B.* Also *Hullock's* Law of Costs, p. 463. to 467.

Matthie and Others v. Potts.

Feb. 6th.

THIS was an action on two policies of insurance on goods at twenty guineas *per cent.* In one of the policies the risk was described "at and from *Nassau* to *Campeachy*, and at and from *Campeachy* to *Nassau per* the ship or vessel called *La Pura y Limpia*, or any other *Spanish* ship or ships;" and in the other, "*Per* the *Spanish* schooner *La Pura y Lympia* from *Nassau* to *Campeachy* with a licence from the Governor of *Nassau*, and back in the same ship *La Pura y Lympia*, or any other ship or ships."

Insurance on goods on board a *Spanish* ship from *Nassau* to *Campeachy* to continue on the goods till discharged and safely landed. The ship having a licence from the *British* Governor at *Nassau* sailed [illegible] *Campeachy*, and having arrived off that port made signals for launches to come out, into which the goods were put for the purpose of being run ashore. In this situation the goods were seized by two *Spanish* Government brigs, it being contrary to the *Spanish* laws to import *British* goods into the *Spanish* main. It seems that the goods were protected by the policy while on board the launches, such being the usual method of carrying on that trade. But it was held that such a loss was not well described by an averment, stating that the goods were seized "in a forcible and hostile manner by certain persons enemies of our Lord the King to the Plaintiff unknown."

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1802.
MATTHIE and Others v. POTTS.

The risk in both policies was described as usual to endure upon the goods until the same should be discharged and safely landed. In the count upon the first policy it was averred, that goods to the amount insured were shipped on board the said ship to be carried from *Nassau* upon the voyage aforesaid, "the said ship or vessel then and there being licensed for that purpose;" and in the count upon the second policy, "that the said ship or vessel was licensed as in the said policy of assurance mentioned." The loss in both counts was stated in the same manner, *viz.* that before the said goods were discharged or safely landed they were "in a forcible and hostile manner seized, captured, taken, and carried away by certain persons then being at enmity and open war with our Lord the King to the Plaintiffs unknown."

At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Michaelmas* Term, it was admitted that the *Spanish* vessel *La Pura y Limpia* was duly licensed for the voyage in question by the Governor of the *Bahama* Islands pursuant to his Majesty's instructions to the said Governor, but that no licence was granted by the *Spanish* government or any other person on their behalf; that the said vessel was loaded with the goods mentioned in the declaration and bills of lading; that *La Pura y Lympia* sailed on the voyage in question from the *Bahama* Islands on the 21st *April* 1800, and on the 30th of the same month arrived at a port near *Campeachy*, and put the goods into a launch with a view of running them ashore at *Campeachy* in the night, which goods were afterwards seized in their passage to *Campeachy* by two *Spanish* government brigs, the landing the same being illegal by the revenue laws of *Spain*, and were wholly lost to the plaintiffs.

It was proved, that all *Spanish* vessels laden with *British* merchandize trading to the *Spanish* main are by the *Spanish* laws liable to confiscation; and that at *Campeachy* those laws are enforced more strictly than in other parts of the *Spanish* main; that the usual method of carrying on this sort of trade to *Campeachy* is for the vessels to lie off the coast as near to the port of *Campeachy* as can be done with safety, and there to make signals for the launches to come off from shore; but that in some cases the vessels do venture to sail directly into the port itself; and that the launch in which the goods in question were at the time of the seizure had put off from shore in the manner above mentioned. His Lordship directed the jury, in case they should be of opinion

 that

1802.
MATTHIE and Others v. POTTS.

that the trade was conducted in the present case in one of the usual modes (a), to find a verdict for the Plaintiff, which they accordingly did.

Williams Serjt. on a former day obtained a rule to shew cause why this verdict should not be set aside and a new trial be had, first on the ground that the averment in the declaration that the goods were captured in a forcible and hostile manner by the King's enemies was not supported by the evidence, and secondly that as the licence of the *British* Governor at *Nassau* was confined to the *Spanish* ship, the goods were not protected by the licence from *British* capture when on board the launch, and consequently the risk at that time was materially different from that insured against.

When the case came on the Court seemed to think that the latter objection was not of any weight, but intimated a strong opinion that the former objection must prevail, and recommended the Plaintiffs to consent to a new trial, and in the mean time amend the declaration.

Shepherd and *Vaughan* Serjts. for the Plaintiffs, expressed their willingness to accede to this proposal on payment of the costs by the Defendant; but the payment of costs being resisted, they contended that the averment in the declaration was sufficiently proved by the evidence, since it appeared that the goods were seized by persons being enemies of the King in a situation which rendered them the subject of prize; that although it appeared that the goods were contraband by the laws of *Spain*, it was not expressly stated in the admissions that they were seized for that reason, and that unless that circumstance were distinctly made out the seizure of *British* goods by *Spanish* vessels must be taken to be a seizure *jure belli*.

The Court however retaining their former opinion declared that the new trial ought to be granted without payment of costs; and *Chambre* J. added, that he had no hesitation in stating, that in his opinion the Plaintiffs ought to have been nonsuited, because the evidence produced did not support the averment of loss in the declaration.

Rule absolute.

(a) See *Harry* v. *The Royal Exchange Assurance Company*, *ante*, vol. 2. p. 430. and *Rucker* v. *The London Assurance Company*, *ante*, vol. 2. p. 432. *in notis*, where it was holden that goods were protected by the policy while on board public lighters employed to land them in the usual course of trade.

1802.

Feb. 8th.

NATHANIEL TAYNTON, Adminiſtrator, &c. of JOHN HANNAY deceaſed *v.* RAMSAY HANNAY.

The authority of an adminiſtrator appointed according to the proviſions of the 38 *G.* 3. *c.* 87. during the abſence of an executor from this country does not become actually void upon the death of ſuch executor, but only voidable.

ASSUMPSIT. The declaration began thus: "*Ramſay Hannay* late of *Weſtminſter*, &c. was attached to anſwer *Nathaniel Taynton*, adminiſtrator of all and ſingular the goods, chattels, and credits of *John Hannay*, ſpecially appointed adminiſtrator thereof with the will annexed according to the force and effect of an act paſſed in the 38th year of the reign of his preſent Majeſty, and alſo by a decree and decretal order of the High Court of Chancery of our Sovereign Lord the King, holden at *Weſtminſter* in the county of *Middleſex*, made in a certain cauſe inſtituted in the ſaid Court by one *Thomas Rainsford* and *Jane* his wife againſt the ſaid *Nathaniel* and *Johnſtone Hannay*, *Richard Hoy*, and *Mary* his wife, and whilſt the ſaid cauſe was depending in the ſaid Court of the Chancery of our ſaid Lord the King, to wit, on *Thurſday* the 21ſt day of *March* in the 39th year of the reign of our ſaid Lord the King at *Weſtminſter* in the ſaid county of *Middleſex*, ſpecially appointed to collect and get in the outſtanding debts and effects of the ſaid *John Hannay* according to the force and effect of the ſaid act, as by the ſaid decree and decretal order duly enrolled by the ſaid Court of Chancery of our ſaid Lord the King at *Weſtminſter* in the ſaid county of *Middleſex*, and now there remaining, relation being thereunto had, will amongſt other things more fully and at large appear, of a plea of treſpaſs on the caſe, and whereupon the ſaid *Nathaniel* adminiſtrator as aforeſaid and authoriſed as aforeſaid complains For that whereas," &c. The declaration contained counts for money had and received, money lent and advanced, money paid, laid out, and expended, and upon an account ſtated in the lifetime of the teſtator, alſo a count upon an account ſtated with the Plaintiff, "adminiſtrator as aforeſaid and authoriſed as aforeſaid," and another for intereſt upon monies due or owing to the Plaintiff, "adminiſtrator as aforeſaid and authoriſed as aforeſaid," forborn by him "adminiſtrator as aforeſaid and authoriſed as aforeſaid." The breach to the above counts was in theſe words: "Yet the ſaid *Ramſay* not regarding his aforeſaid ſeveral promiſes and undertakings ſo made by him in this behalf as aforeſaid, but contriving and fraudulently intending craftily and ſubtilly to deceive and defraud the ſaid *John* in his lifetime, and the ſaid *Nathaniel* adminiſtrator as aforeſaid and

authoriſed

authoriſed as aforeſaid ſince his death in this reſpect, hath not yet paid the ſaid ſeveral ſums of money or any part thereof to the ſaid *John* in his lifetime, or to the ſaid *Nathaniel* ſince his deceaſe (to which ſaid *Nathaniel* letters of adminiſtration of the goods, chattels, and credits of the ſaid *John* were according to the force and effect of an act paſſed in the 38th year of the reign of his preſent Majeſty by *John* by divine Providence Archbiſhop of *Canterbury*, primate of all *England* and Metropolitan in due form of law granted, to wit, at *Weſtminſter* aforeſaid in the county aforeſaid, on the 8th day of *December* 1798, and which ſaid *Nathaniel* was by a decree and decretal order of the High Court of Chancery of our Sovereign Lord the King, holden at *Weſtminſter* in the ſaid county of *Middleſex*, made in a certain cauſe inſtituted by one *Thomas Ramsford* and *Jane* his wife againſt the ſaid *Nathaniel*, *Johnſtone Hannay*, *Richard Hay* and *Mary* his wife, and whilſt the ſaid cauſe was depending in the ſaid Court of Chancery, to wit, on the 21ſt day of *March* in the 39th year of the reign of the now King, at *Weſtminſter*, in the ſaid county of *Middleſex*, ſpecially appointed to collect and get in the outſtanding perſonal eſtate of the ſaid *John Hannay*, according to the force and effect of the ſaid act as by the ſaid decree and decretal order duly inrolled in the ſaid High Court of Chancery at *Weſtminſter* aforeſaid in the county aforeſaid, and now there remaining, relation being thereunto had will more fully and at large appear) or to either of them, although ſo to do he the ſaid *Ramſay* was requeſted by the ſaid *John* in his lifetime and by the ſaid *Nathaniel* ſince his death afterwards, to wit, on the ſaid 1ſt day of *Auguſt* 1800 aforeſaid, and often afterwards, to wit, at *Weſtminſter* aforeſaid, nor did he pay the ſame or any part thereof to *Johnſtone Hannay*, to whom probate of the will of the ſaid *John* was by due authority granted, and which ſaid *Johnſtone Hannay* at the time of the granting of the ſaid letters of adminiſtration of the goods, chattels, and credits of the ſaid *John Hannay* to the ſaid *Nathaniel*, was and ſtill is reſiding out of the juriſdiction of his Majeſty's Courts of Law and Equity in that part of *Great Britain* commonly called *England*, and out of *England* aforeſaid, and which ſaid *Johnſtone Hannay* was at the time of the commencement of this ſuit reſiding out of the juriſdiction of his Majeſty's Courts of Law and Equity in that part of *Great Britain* commonly called *England*, and out of *England* aforeſaid, but he to do this hath hitherto wholly refuſed and ſtill refuſes: wherefore the ſaid *Nathaniel*, adminiſtrator as aforeſaid ſays, he is injured and hath

1802.

TAYNTON *v.* HANNAY.

1802. TAYNTON v. HANNAY.

sustained damage to the value of 300*l.* and therefore he brings his suit, &c. And the said *Nathaniel* in fact saith, that the said decree and decretal order is in full force and effect not in anywise reversed, annulled, set aside, or rendered void. And he brings here into Court the letters of administration of the said *John*, which sufficiently prove to the Court here the granting thereof in form aforesaid, the date whereof is on the day and year in that behalf mentioned."

The Plaintiff craved *oyer* of the letters of administration, which being accordingly set out, appeared to be in the form prescribed by the Stat. 38 *Geo.* 3. *c.* 87. He then pleaded, 1st, *Non assumpsit;* 2dly, that *Johnstone Hannay* was not at the time of the commencement of the suit residing out of *England;* 3dly, a set-off; upon which three pleas issues were joined. Fourthly, he pleaded "that the said *Johnstone Hannay* on the 18th day of *July* in the year of our Lord 1801, at *Westminster* aforesaid in the said county, died."

To this last plea the Plaintiff demurred generally, and the Defendant joined in demurrer.

Onslow Serjt. in support of the demurrer. This question depends upon the construction of 38 *Geo.* 3. *c.* 87. and the decree of the Court of Chancery founded thereupon. That act after reciting that the laws then existing were not sufficient to enforce a speedy distribution of the assets of deceased persons where the executor to whom probate of the will had been granted was out of the jurisdiction of his Majesty's Courts of Law and Equity, provides that where such executor shall reside out of the jurisdiction of such Courts, the Ecclesiastical Court may on the application of any creditor, next of kin or legatee, grant to any person named on their behalf special administration for the purpose of being made a party to a bill in equity to be exhibited against him, and to carry the decree into effect but no farther. The 4th section enacts that the Court of Equity in which such suit shall be depending may appoint any person to collect the debts due to the estate and give discharges for the same. The fifth section contains this proviso, "that if the executor capable of acting as such shall return to and reside within the jurisdiction of any of the said Courts pending such suit, such executor shall be made party to such suit, and the costs incurred by granting such administration and by proceeding in such suit against such administrator, shall be paid by such person or out of such fund as the Court where such

 suit

suit is depending shall direct. Now the present Plaintiff having been appointed administrator by the Ecclesiastical Court and collector of the debts due to the testator under a decree of the Court of Chancery, nothing is disclosed by the plea to prevent him from proceeding in this suit. It appears from the proviso in the 5th section that the Legislature did not intend that the special administration should cease immediately upon the return of the executor; for if that authority were to cease on that event happening, it would be unnecessary for the executor to be made a party to the suit in Equity; and if the authority does not cease immediately upon the return of the original executor, neither will it cease upon the death of such executor. Upon the death or return of the executor the authority of the special administrator becomes voidable, but it cannot be actually avoided without obtaining a reversal of the decree of the Court of Equity, and possibly the Court of Equity might refuse to reverse the decree without obliging those who applied for such reversal to pay the costs incurred or bring the fund into Court.

Bayley Serjt. *contrà*. The authority derived under this act of Parliament is a temporary administration granted for special purposes, and when those purposes cease, the authority is not merely voidable, but void. If an executor resident out of the kingdom never prove the will, and administration be granted to one *durante absentiâ* of such executor, upon the return of the executor the administration becomes void. *Slater* v. *May*, 2 Lord *Raym*. 1071. So where administration is granted *durante minori ætate*, if pending the action the minor comes of age it may be pleaded in bar *puis darrein continuance*. *Major* v. *Peck*, 1 *Lutw*. 338. In case of the death of the executor *a fortiori* the above rule must prevail, for if he leave a will and appoint an executor resident within the kingdom, that executor becomes the legal representative of the first testator, and if no executor be nominated, administration *de bonis non* may be taken out. If an administrator *durante absentiâ* of the executor who has not proved the will file a bill in equity or commence an action at law, it is clear that upon the death of the executor such suit will abate, and if it had been the intention of the Legislature that such suits commenced by an administrator appointed under the statute on account of the absence of an executor who has proved should not abate, it is reasonable to suppose that some provision would have been introduced to put both cases upon the same footing.

1802.
TAYNTON
v.
HANNAY.

Lord ALVANLEY Ch. J. On the best consideration which I can bestow upon this case I am of opinion that the power derived under this act of Parliament and the decree of the Court of Chancery must from the nature of the case be held to be determined by the death of the executor; on which event a new right accrued to some other person to take out administration either as next of kin to the original testator, or as executor of the deceased executor. I do not think that the act of Parliament has gone far enough to confer any right upon the special administrator, after the causes have ceased for which the administration was granted. The object of those who introduced this act was to remedy the inconvenience arising from the Ecclesiastical Courts not thinking themselves authorised to grant a new administration where probate had been once granted and the executor was gone abroad. The consequence of this defect in their authority was that there was no person existing within the jurisdiction of the Courts of Law or Equity duly authorised to appear or to collect the debts, as there was in those cases where administration was granted *durante absentiâ* of an executor who had never proved the will. It never was supposed that a Court of Equity had any power, before any suit commenced against the executor, to appoint a person to collect the debts of the testator: but when once a person capable of sustaining the character of legal representative was brought into a Court of Equity, that Court in case of his insolvency or misconduct would appoint another person to manage the affairs of the testator, and compel the legal representative to permit such person to sue in his name: but even in that case the person so appointed could never be empowered to sue in his own name. This being the case, if an executor to whom probate had been granted went abroad, nothing could be done: the Court of Equity could entertain no suit, there being no person to stand in the situation of the testator, and the Ecclesiastical Court could not grant administration *ad colligenda bona*. The act of Parliament after reciting this grievance authorises the Spiritual Court to grant special letters of administration in the form there set forth: from the words of which letters we must learn the authority of the administrator. Now by the letters of administration it appears that he is constituted administrator for the purpose of being made a party to a bill in equity to be exhibited against him, and to carry the decree into effect, "but no further or otherwise:" so that the authority is specially

ſpecially confined to the purpoſes of that ſuit. Then it is urged that by virtue of the fourth ſection of the act the Plaintiff being ſuch adminiſtrator is appointed by the Court of Equity to collect the debts; and that the authority under that appointment ſtill ſubſiſts. But how long is the ſuit in equity to continue? and how long is the collector to act? It is anſwered that the act has provided, that upon the return of the executor he may be made a party to the ſuit in equity, and may obtain a reverſal of the appointment. But it ſeems to me that the moment the executor becomes amenable to the Court he not only may but muſt be made a party to the ſuit, and that until he be, the cauſe muſt ſtand ſtill, and there muſt be an end of the collection of the debts. For a Court of Equity to authoriſe a perſon to collect the debts of a teſtator in the room of the real repreſentative, when that repreſentative is capable of being brought before the Court, and yet is not brought before the Court, would be a proceeding altogether unheard of, and would be infringing on his legal rights. He might take out probate of the will, and thereby at once ſuperſede the authority of the ſpecial adminiſtrator and collector. The true conſtruction of the act as it ſeems to me is this, that where the real repreſentative is beyond the juriſdiction of the Court of Chancery and incapable of acting for himſelf a power is given to ſubſtitute another perſon during his abſence: but the moment ſuch repreſentative is capable of doing his own duty, or that in conſequence of his death any other perſon becomes entitled to perform that duty in his ſtead by taking out adminiſtration, all the inconvenience which it was the object of the act to provide againſt is at an end: and conſequently the power which was given to the ſpecial adminiſtrator during the abſence of the executor is done away. Though I could have wiſhed that the act had gone farther and authoriſed the ſpecial adminiſtrator to act until a new adminiſtration had been taken out, yet under the terms of this act of Parliament I cannot find that we are authoriſed to extend the power of the ſpecial adminiſtrator, ſince by ſo doing we ſhould enable him to collect all the debts which it belongs to the new repreſentative to collect, before the latter could have an opportunity of inveſting himſelf with the proper authority. The act of Parliament provides only for a ſpecial caſe; and the moment that any perſon capable of acting as repreſentative comes within the juriſdiction of the Courts of Law and Equity the power ceaſes; and

1802.
TAYNTON
v.
HANNAY.

the Court of Equity will not proceed in the suit until he be made a party. Under the circumstances of this case the Court of Equity probably would supersede the power given to the Plaintiff. If the next of kin to the original testator were to refuse to take out administration, the Spiritual Court would grant administration *ad colligenda bona:* but this is only done upon the refusal of the party entitled; and the authority in such case would not be derived from the Court of Chancery but from the Spiritual Court. Upon the whole I am of opinion that the administration is at an end, and that the present Plaintiff cannot maintain the action in his own name.

ROOKE J. This is a question on the construction of a new act of Parliament, and it is with considerable diffidence I entertain an opinion different from that of my Lord on the interpretation to be put upon that act; especially when I consider his long experience in a Court of Equity. As this is a new case I think the best course which we can pursue is to adopt that construction which will most essentially promote the ends of justice. The objection is taken not by the executor, nor by any person having a right in consequence of his death, but by a debtor only, who is at all events answerable to the estate of the deceased testator. The person who now sues, does it under a special authority granted to him by virtue of the act of Parliament, and is entirely under the control of the Court of Equity by which he is appointed collector, and to which he is accountable for every step of his proceedings. Though on the death of the executor a new right accrues, yet until that right be completed and reduced into effect, I think the special authority granted to the Plaintiff ought to continue in force. Let us see what this special administration is. The Plaintiff is appointed administrator for the purpose of becoming a party to the bill in Equity and of carrying the decree into execution but no further. The administration therefore is confided to him; and during the absence of the executor, while living, he certainly could collect the effects by suing in a Court of Law and his title would be there recognized. Now the Legislature have foreseen one case and provided for it, *viz.* the return of the executor; in which event the suit in Equity does not abate but the executor is only to be made a party to it. Then shall we put such a construction on the act as to say, that in consequence of the death of the executor the present suit is abated and that the action must be

begun *de novo* by the new representative. As the suit in Equity does not abate upon the return of the executor I think we are warranted in saying that it continues until the appointment of a new representative notwithstanding the death of the executor. If this construction be not put upon the act great inconvenience may ensue. Suppose the executor to die in *India* and no intelligence to arrive in *England* of his death till six months afterwards; if all the intermediate acts of the special administrator are to be set aside great confusion will follow. I am therefore of opinion that the authority of the Plaintiff, though it became voidable by the death of the executor, was not rendered actually void.

CHAMBRE J. I entirely concur with my brother *Rooke* in thinking that the plea is bad, and that the Plaintiff is entitled to judgment, and I will add that I have no great difficulty in forming this opinion. This act of Parliament was certainly made for very beneficial purposes, but many of its provisions have been framed with a very short-sighted view of legal consequences: of this I could point out many instances, but it is not necessary in the present case. The special administration in the present case has been compared to other limited administrations; which however appear to me to be of a very different sort. Where administration is granted *durante absentia*, or *durante minoritate*, it expires by the terms of the authority upon the executor returning or coming of age: and if we could find that the Legislature had prescribed any express limitation in the present instance by the terms in which the authority is directed to be granted, we should be bound to abide by the expressions of the statute. But I think that the intention of the Legislature was not to limit the authority to the return or death of the executor: and certainly I am not inclined by argument from analogy to narrow the beneficial effects of this act, but on the contrary where the construction is doubtful I should rather be disposed to enlarge them. Great inconvenience might arise from the construction contended for by the Defendant. And though, when all the parties are resident in *England*, these inconveniences may be easily remedied by taking out administration, yet other cases might give rise to great embarrassment, and the present affords a striking instance of this sort. It is said that *Johnstone Hannay* died in *India*, but under what circumstances, and whether he left a will and appointed an executor, does not appear. Till these circumstances can be ascertain-

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1802.

TAYNTON v. HANNAY.

ed, and the will of the deceased executor proved, or administration to the original testator taken out, all proceedings to do justice to the creditors must be suspended, and two years may elapse before any thing can be done. This is a limited administration, and the nature of the limitation must be collected from the form of the letters of administration which the act prescribes. Now the letters take no notice of the Courts of Law, but direct that the party shall be administrator for the purpose of becoming a party to a suit in equity and of carrying the decree in that suit into effect, and no further or otherwise. The authority is limited and strictly limited. The party therefore is not a general administrator of the effects, but is only an administrator for the purposes of the suit in equity: yet being created by the act administrator for the purposes of the suit he is administrator during the suit, and is to do every thing necessary to give effect to the suit. Then what has the Court of Equity directed him to do? The declaration says that he is appointed to collect and get in the outstanding debts, which implies an authority to bring actions for them, and that authority he has exercised in bringing the present action. This construction appears to me to be strictly warranted by the latter part of the fifth section, which, looking to the arrival of the executor and regarding the special administrator not as a substitute for the executor to all intents, but merely for the purposes of the suit, does not suppose that such arrival would absolutely supersede his authority, but directs that the executor shall be made a party to the suit in equity upon which the authority of the administrator would cease. And though no provision is made in this section in case of the death of the executor, yet I should think that upon his death without a will, if any person should take out a general administration as next of kin to the original testator, or in case of his having made a will and that will being proved by any person capable of acting as executor, such administrator or executor might apply to be made a party to the suit in equity, and it would be matter of course for the Court of Equity to put an end to the authority of the special administrator. But though I think that a Court of Equity under these circumstances would be authorised by analogy to adopt this line of conduct, it is unnecessary for me to give an express opinion upon that point. I take it to be clear that the Plaintiff must be considered as administrator during the continuance of the suit in Equity, until some act has been

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done either by the Court of Chancery or the Ecclesiastical Court to determine his authority. In this case nothing has been done. Under these circumstances therefore I am of opinion that the authority of the Plaintiff remains, and that judgment ought to be given in his favour.

1802. Taunton v. Hannay.

Judgment for the Plaintiff.

Morck and Another v. Abel.

Jan. 9th.

A foreigner cannot recover back the premium paid by him upon a policy of insurance, if the voyage be in contravention of the British laws. Therefore where a policy was effected upon a Danish ship at and from Bengal (in which there are Danish settlements) to Copenhagen, and the ship loaded at Calcutta contrary to the 12 Car. 2. c. 18. s. 1. the Court held that the assured was not entitled to recover back the premium even though it appeared that the practice of loading foreign ships at Calcutta had prevailed for a length of time, and had been authorised by act of Parliament soon after the shipment in question.

This was an action on a policy of insurance effected on the 26th *July* 1797 on goods on board the *Juliana Maria*, warranted *Danish* ship and property, "at and from *Bengal* and all and every port or place wheresoever and whatsoever, as well on the other side as at and on this side the *Cape of Good Hope*, in port and at sea, in all places and at all times, with liberty to touch, stay, and trade, load and unload and reload; at all and any of the said ports and places, until the ship's arrival at *Copenhagen*." The declaration alleged that the cargo was put on board at *Calcutta* in *Bengal*, that the Plaintiffs were interested, and that the ship and cargo were afterwards captured "by certain then enemies of our Lord the King."

The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Michaelmas* Term, when it appeared that the Plaintiffs were subjects of *Denmark* and resident in *Copenhagen*, and the ship *Juliana Maria* a *Danish* ship; that the cargo which was the subject of the present insurance was taken on board at *Calcutta* on the 5th *March* 1797; and that the ship and cargo on the voyage from *Calcutta* to *Copenhagen* were captured by the *French* and condemned as prize. An objection was taken to the Plaintiffs' recovery on the ground of its being illegal under the provisions of the 12 *Car.* 2. *c.* 18. *s.* 1. to export goods from *Calcutta* in any ship not belonging to a *British* subject: and this objection prevailing the Plaintiffs then insisted that if the exportation from *Calcutta* were illegal, the risk never commenced, and that the Plaintiffs therefore were entitled to a return of premium. The Jury were directed by his Lordship to find a verdict for the Plaintiffs, liberty being reserved to the Defendant to move that such verdict might be set aside and a nonsuit be entered.

Accordingly a rule *Nisi* for that purpose having been obtained, *Shepherd* and *Best* Serjts. now shewed cause. Admitting the principle

1802. ciple laid down in *Vandyck* v. *Hewitt*, 1 *East.* 96. that where a policy is effected to insure a trading with an enemy, the contract is such a complete violation of the general law of the country, that the assured cannot recover back his premium, still that principle cannot govern the present case. The loading the cargo insured at *Calcutta* by the Plaintiffs was merely a violation of a particular law, to which though every *British* subject is bound to pay implicit obedience, yet, as against a foreigner, a knowledge of that law cannot be implied so as to subject him to the same penalties for the disobedience of the law which a *British* subject would incur. Now the policy in the present case being effected in favour of a *Danish* subject and being contrary to the municipal law not of his own country but of *Great Britain*, is certainly not an immoral contract: for though it be immoral in the subject of any state to violate the laws of his own state, yet it is not immoral in him to violate the local regulations of another state. In *Vandyck* v. *Hewitt* Lord *Kenyon* observes, "there is no distinguishing this case in principle from the common case of a smuggling transaction: where the vendor assists the vendee in running the goods to evade the laws of the country he cannot recover the goods themselves or the value of them." Undoubtedly that position is completely established by the cases of *Clugas* v. *Penaluna*, 4 *Term Rep.* 466. and *Weymel* v. *Read*, 5 *Term Rep.* 599. But it is to be observed that the principle on which those decisions in part proceeded was, that where a foreigner assists in the attempt to evade the *British* laws, as by packing the goods in a manner convenient for smuggling, he thereby evidences his knowledge of the law which he violates, and cannot therefore avail himself of the plea of ignorance to which the present Plaintiffs are entitled. If there be any case in which the Court will presume a party ignorant of the law which he has violated for the purpose of enabling him to recover, they may do so in this: for it may well be presumed that the Plaintiffs were not aware that it was unlawful to export in any other than a *British* ship, since previous to the shipment in question, such a practice had prevailed and been encouraged: so much so that on the 19th *July* 1797, only four months after this cargo was taken on board, the 37 *Geo.* 3. *c.* 117. was passed, which after reciting the expediency of allowing ships belonging to states in amity with this country to bring goods from

MORCK and Another v. ABEL.

India,

India, removed under certain restrictions the prohibition imposed by the navigation act. 1802.

Monck and Another v. Jeel.

Vaughan Serjt. *contrà*. In *Howson* v. *Hancock*, 8 *Term Rep.* 577. Lord *Kenyon* says, "there is no case to be found where when money has been actually paid by one of two parties to the other on an illegal contract, both being *particeps criminis*, an action has been maintained to recover it back again." His Lordship adds, "here the money was not paid on an immoral, though an illegal consideration: and though the law would not have enforced the payment of it yet having been paid it is not against conscience for the Defendant to retain it." If the proposition laid down by Lord *Kenyon* be true where both parties are *participes criminis*, surely it will apply with double force to the present case where the Plaintiff is the sole offending party; for this policy being general from *Bengal*, where the *Danes* have settlements, to *Copenhagen* was not illegal when effected, though the subsequent illegal act of loading from *Calcutta* has deprived the Plaintiff of his right to recover. The case of *Vandyck* v. *Hewitt* has been distinguished on the ground of the Plaintiffs in that case having violated the general law of the country, whereas the present Plaintiffs have, it is said, offended against a mere municipal regulation. But the act of navigation, which was in fact passed against foreigners, and has formed so essential a groundwork of our naval strength, can hardly be deemed a mere municipal regulation, or wholly unknown to foreigners. It is to be observed that the present Plaintiffs never claimed the return of premium until they had failed in their demand for a total loss; the risk therefore was run before the contract was attempted to be rescinded, and the distinction sometimes taken between contracts executory and executed will not help the Plaintiffs' claim. The cases of *Lowry* v. *Bourdieu*, *Doug.* 468. and *Andrée* v. *Fletcher*, 3 *Term Rep.* 266. are decisive to shew that the Plaintiffs are not entitled to recover; for in both those cases the policies being illegal and the risk been run the assured were not allowed to recover the premium.

Lord ALVANLEY Ch. J. Unfortunately this policy was effected previous to the passing of the 37 *Geo.* 3.; and though I believe that before the passing of that statute the provisions of the navigation laws had been relaxed in practice with respect to foreigners, still in a Court of Law the Plaintiffs are not entitled to recover if the trading in question contravened the regulations of

Morck and Another v. Abel.

that act. The point however upon which this case comes before the Court is, whether there be any difference between this case and that of *Vandyck* v. *Hewitt*? Undoubtedly that was a case in which the trading was in direct violation of the common law of this country, but before that decision took place, many of the distinctions which had been taken between immoral and illegal contracts had been considerably shaken; and the principle which I think must now be extracted from the cases upon this subject is, that no man can come into a *British* Court of Justice to seek the assistance of the law who founds his claim upon a contravention of the *British* laws. Let us consider then what this policy is. It is an insurance upon a voyage from any part of *Bengal* to *Copenhagen*. The underwriter contends, that large as the policy is, still it is the business of the assured to take care that he takes in his cargo at some port in *India* where he may legally do so. The assured having loaded at *Calcutta*, has not attended to that restriction, but has thereby contravened the navigation act. Capture being one of the losses insured against, the assured has claimed an indemnity upon that ground: to which the *British* underwriter answers, you had no right to take in your cargo at a *British* settlement, and therefore he refuses to pay. The assured sets up a distinction in his own favour upon the ground of his being a foreigner, and urges that although he may have contravened the *British* laws, he has done so from ignorance only. But even looking at the case in this point of view I do not think the Plaintiff is taken out of the general rule applicable to cases where a party enters into an illegal contract. The case of *Andrée* v. *Fletcher* is a very strong authority, for there it was holden that a foreigner could not recover back the premium paid on a policy which was illegal according to the laws of this country. The question here is, whether the Plaintiff having contravened the *British* laws, can recover by the aid of those laws? and after consideration of all the cases, I am of opinion that he cannot recover and that the Defendant is entitled to have a nonsuit entered.

Rooke J. (*a*). I consider the point made in this case as having been decided in the case of *Andrée* v. *Fletcher*: and I do not see any reason to differ from that authority. If the assured instead of

(*a*) *Heath* J. having been absent during the former part of the Term from indisposition, and not having heard the argument on the part of the Plaintiffs, gave no opinion upon the case.

 seeking

ſeeking to recover for a total loſs had in the firſt inſtance ſtated to the underwriters that as the cargo was loaded from *Calcutta* they had no right to recover upon the policy, and therefore ſought a return of premium, there might have been ſome pretence for the claim which he has made: but inſtead of adopting this line of conduct they have firſt endeavoured to affirm the contract by making a demand for a total loſs, and failing in that, they now diſaffirm the contract and ſeek a return of premium. But it appears to me that they are not entitled to ſucceed, for having acted in defiance of the laws of this country they ſhall not have the aſſiſtance of thoſe laws to enable them to recover.

Chambre J. I am of the ſame opinion. It is perfectly ſettled that in the caſe of an illegal contract neither party can recover from the other money paid upon that contract: and that rule muſt prevail in the preſent caſe unleſs the Plaintiffs can eſtabliſh a diſtinction in their own favour on the ground of being foreigners and ignorant of our laws. But I think that we ought not to relax the rigour of our great political regulations in favour of foreigners offending againſt them, and that there is very little reaſon to preſume ignorance of a law peculiarly applicable to the ſubjects of foreign ſtates. Upon the whole therefore I am of opinion that the Plaintiffs are not entitled to recover back the premium.

Rule abſolute.

Field v. Wainewright.

Feb. 10th.

In juſtifying bail by affidavit where the ſame perſons are bail in more actions than one, each affidavit ought to ſtate that the bail are worth double the amount of the debts in all the actions wherein they offer to become bail.

Shepherd Serjt. moved to juſtify bail by affidavit in this and three other actions, the ſame perſons being bail in each action, and in each of their affidavits ſwearing to property to double the amount of the debt in the ſingle action in which the affidavit was entitled, and not to double the amount of the debt in all the four actions in which they were to juſtify.

On this ground *Bayley* Serjt. oppoſed their juſtification.

And *The Court* after reference to the officers allowed the objection, but gave the Defendant time to amend the affidavits.

1802.

Feb. 10th.

Carpenter and Others, Assignees of Fowler a Bankrupt *v.* Marnell.

Property in which a bankrupt has only a trust estate does not pass to his assignees under the assignment. Therefore the *cestuy que trust* cannot bring any action respecting such property in their names, but ought to bring it in the name of the bankrupt.

Assumpsit on a note in these words: "I promise to pay to Mr. *Joseph Fowler* or order the sum of 150*l.* being the remainder of the consideration for the assignment of his interest in the *Payton* business to me, as soon as I shall receive or may receive the money due upon the completion of the said business from *T. B.* Esquire, his executors, administrators, or assigns, or immediately upon my receiving letters of administration of the estate and effects of Lieutenant-General *Joseph Walton*, otherwise *Brome*, deceased, whichever event shall first take place." Signed "*Richard Marnell.*" This note was indorsed by *Fowler* to one *James Bagster* for a valuable consideration, after which *Fowler* became bankrupt and the Plaintiffs were chosen his assignees; in which capacity they now sued for the benefit of *Bagster*.

The cause was tried before Lord *Alvanley* Ch. J. at the *Westminster* Sittings after *Michaelmas* Term, and a verdict was found for the Plaintiffs subject to the opinion of the Court whether the action was maintainable by them as assignees of *Fowler*.

A rule *Nisi* having been obtained on a former day for setting aside the verdict, and entering a nonsuit,

Best and *Onslow* Serjts. now shewed cause and insisted that the action was well brought by the Plaintiffs as assignees of *Fowler*; that as the note was not negotiable the action could not have been maintained by *Bagster* himself, and though it might possibly have been sustained if brought by *Fowler* yet it did not follow that it might not also be brought by the assignees, for that there were many cases where an action might be sustained either by the bankrupt himself or by his assignees; as in *Fowler* v. *Down*, *ante*, vol. 1. p. 44. and *Webb* v. *Fox*, 7 *Term Rep.* 391. and the several cases there cited, by which it was established that an uncertificated bankrupt or his assignees might maintain actions relative to property acquired subsequent to the bankruptcy; that the only cases which tended to shew that the action was not well brought were *Winch* v. *Keeley*, 1 *Term Rep.* 619. and *Bottomley* v. *Brook*, 22 *Geo.* 3. *C. B.* cit. *ibid.* 621.; but that in both those cases it appeared upon the record that the Plaintiffs were not beneficially interested

terested in the instruments upon which they sued, and as at that time the precise point there determined was considered as new, and Lord *Kenyon* had in a subsequent case of *Bauerman* v. *Radenius*, 7 *Term Rep.* 663. laid it down as clear that Courts of Law can only take notice of legal rights, the Court in this case, which did not fall precisely within the authority of *Winch* v. *Keeley* or *Bottomley* v. *Brook*, would not extend the equitable doctrines there adopted. They observed that it appeared to have been the opinion of Lord *Hardwicke*, that a legal estate in the trust property of a bankrupt passed to his assignees, since he thought it necessary to direct in the case *Ex parte Newton*, 1 *Atk.* 97. that where an assignee is removed on account of his own bankruptcy, not only he but his assignees should join with the commissioners in executing the assignment to the new assignees. 1802. CARPENTER and Others v. MARNELL.

Shepherd Serjt. *contrà* contended that where a bankrupt is interested as a mere trustee, the debt does not pass under the commission; that this point was expressly decided in *Winch* v. *Keeley*, in which case the bankruptcy of the Plaintiff having been pleaded, the Plaintiff replied that he was a trustee, and upon demurrer that replication was held good; that in the present case the Defendant could not have stated the special facts upon the record, since it would only have amounted to the general issue, which is, that the assignees have not nor ever had any right of action; and that as nothing ever passed to the assignees in the note upon which this action was founded, it was impossible to contend with any success that either they or the bankrupt might maintain the action.

Lord ALVANLEY Ch. J. We are all of opinion that this action ought to have been brought by *Fowler*. He was the person to whom the promise to pay was made; he by his indorsement directed the contents of the note to be paid to *Bagster*, and though this indorsement had no legal effect, yet it passed the beneficial interest in the note to *Bagster*, and *Fowler* by the indorsement became a mere trustee for him. The assignees never were in a situation to derive any benefit from this piece of paper. If indeed they had possessed the most remote possibility of interest, or if they could state any thing from which a benefit to the creditors would result, I should hold that the action might be maintained; but at the time when they brought this action it was impossible for them not to know that they had no right to the note. They bring the action in the character of trustees; but they are not trustees for *Bagster*; they are only trustees for *Fowler*'s creditors, and therefore cannot sustain this action.

1802.
Carpenter and Others v. Marnell.

Heath J. expressed himself of the same opinion, and observed that Lord *Hardwicke*'s direction was only *in majorem cautelam.*

Rooke and Chambre Js. concurred.

Rule absolute.

Feb. 10th.

Oppenheim and Another v. Russell.

An usage for carriers to retain goods as a lien for a general balance of account between them and the consignees, cannot affect the right of the consignor to stop the goods *in transitû*. *Semb.* that such a lien could not be established even by agreement between the carrier and the consignor.

Trover for goods.

At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Michaelmas* Term, it appeared from admissions that the Defendant was a common carrier from *London* to *Exeter* and *Plymouth*, and as such received the goods in question from the Plaintiffs, by whom they were consigned to the house of *Negretti* and Co. at *Plymouth*; that *Negretti* and Co. when they ordered the goods to be sent gave no directions respecting any particular carrier, and that there was another carrier from *London* to *Plymouth* besides the Defendant; that previous to the arrival of the goods at *Plymouth*, *Negretti* and Co. had failed, and a notice had been given to the Defendant by the Plaintiffs not to deliver them to *Negretti* and Co., the Plaintiffs at the same time tendering to the Defendant his charge of 1 *l.* 7 *s.* 2 *d.* for the carriage of the goods and offering to indemnify him; that the carriage of the goods was to have been paid by *Negretti* and Co. if the goods had been delivered to them; and that the sum of 4 *l.* 7 *s.* was due from *Negretti* and Co. to the Defendant for the carriage of other goods; that the Defendant offered to deliver the goods to the Plaintiffs on their paying him the two sums of 4 *l.* 7 *s.* and 1 *l.* 7 *s.* 2 *d.* and indemnifying him; that the Defendant in *January* 1801 gave public notice by circulating hand-bills and advertisements in the *London* Gazette and other newspapers, that all goods which should be delivered for the purpose of being carried, would be considered as general liens and subject not only to the money due for the carriage of such particular goods, but also to the general balance due from the respective owners to the proprietor of the waggon, and that one of the above mentioned hand-bills had been delivered to *Negretti* and Co. at their shop in *February* last. The Defendant then offered evidence to shew that it was the usage among carriers to retain for their general balance, but Lord *Alvanley* rejected the evidence, being of opinion that it was not admissible, and that the consignor's right to stop *in transitû* could not be affected by such an usage if established. A verdict was found for the Plaintiffs with liberty to the Defendant to apply to the Court for a new trial.

Accordingly

Accordingly a rule *Nisi* having been obtained on a former day, 1802.

Lens and *Best* Serjts. were now called upon to support the rule. The right of the consignor to stop goods *in transitû* is a mere equitable right and cannot be supported on the ground of a strict legal claim. Indeed no case is to be found in the books where this right has prevailed against any other than the immediate consignee, and it has never yet been allowed to affect third persons. Whatever might have been the prevailing opinion previous to the case of *Dawes* v. *Peck*, 8 *Term Rep*. 330., it is fully established by that case that where the consignee appoints a particular carrier, pays the carriage, and is answerable to the consignor for the goods notwithstanding they are lost or damaged on the road, the consignee is the only person who can maintain an action against the carrier for such loss or damage. This shews that the delivery to the carrier is a delivery to the consignee so far as to vest the legal right to the goods in him; and though in the present case it is admitted that there was another carrier by whom these goods might have been sent, and that no particular directions were given by *Negretti* and Co. by whom they should be sent, yet it is expressly stated that they were to pay the carriage. If then the right to stoppage *in transitû* be a mere equitable right, it must like other equitable rights operate only as between the two contracting parties, and cannot affect third persons. It is to be recollected that it is a right of but late introduction into the law of *England*, *Wiseman* v. *Vandeput*, 2 *Vern*. 203. being the first case in which it was recognised, and there it was treated as an equitable right; and though Lord *Hardwicke* in *Snee* v. *Prescot*, 1 *Atk*. 245. went farther and considered it more as a legal right, still the question there was between the consignor and consignee only without the intervention of a third person. In *Lickbarrow* v. *Mason*, 2 *Term Rep*. 63. 1 *H. Bl*. 357. 2 *H. Bl*. 211. 5 *Term Rep*. 367. 683. the interest of third persons as affected by the doctrine of stoppage *in transitû* came to be considered, and after much discussion it was finally settled that however the right might prevail as between consignor and consignee, it could not prevail against a person holding under a bill of lading indorsed to him by the latter. That case only differs from the present in respect of a transfer of property by a bill of lading being more formal, than a transfer by delivery to a carrier; but if the latter so far vests the property in the consignee as to enable him to sue for any loss or damage, no

OPPENHEIM and Another v. RUSSELL.

1802.
OPPENHEIM and Another v. RUSSELL.

legal right can remain in the consignor. Lord *Kenyon* in *Dawes* v. *Peck* reprobated the idea of the property being in a fluctuating state between the consignor and the consignee, and Mr. Justice *Grose* in the same case calls the consignor's right to stop *in transitû* "in its nature an equitable right." So in *Hodson* v. *Loy*, 7 *Term Rep.* 445. Lord *Kenyon* considers the right as a "kind of equitable lien adopted by the law for the purposes of substantial justice," and observes that it does not proceed on the ground of rescinding the contract. If then the property in the goods vested in *Negretti* and Co. by delivery to the Defendant, a portion of their legal right vested in the Defendant and which will be sufficient to countervail the equitable right of the Plaintiffs. The latter claim through *Negretti* and Co. and therefore can only claim to the same extent as *Negretti* and Co. could have claimed. That the Defendant had a right to set up a general lien against the consignee of the goods, is clear, and was admitted in *Naylor* v. *Mangle*, 1 *Esp. N. P. Cas.* 109. and also in a case of *Aspinall* v. *Pickford* (*a*), 9th *June* 1800, *coram* Lord *Kenyon* at *Guildhall*. The same lien has been established in favour of wharfingers, dyers, and bleachers; as in *Kirkman* v. *Shawcross*, 6 *Term Rep.* 14. and in *Ross* v. *Johnson*, 5 *Bur.* 2827. Lord *Mansfield* says, "it is impossible to make a distinction between a wharfinger and a common carrier;" in this case however it should have been left to the Jury to decide whether the consignor was not aware of the custom acted upon by the Defendant (and of which notice was given to the consignees) of retaining for a general balance; in which case a contract of the same kind might have been presumed as against him.

Shepherd and *Bayley* Serjts. *contrà*. The consignor's right to stop *in transitû* is not an equitable, but a strict legal right. *Burghall* v. *Howard*, 1 *H. Bl.* 365. *n.* where Lord *Mansfield* says, that the consignor's right is founded "not upon principles of equity only, but the laws of property." Indeed if it were otherwise, it would not have been possible, as has been done in several cases,

(*a*) *Aspinall, assignee of Howarth* v. *Pickford*.

Guildhall Sittings after *East.* T. *coram* Lord *Kenyon*.

Trover for goods.

The defence was that the goods were put by *Howarth* into the hands of the Defendant as a carrier to be forwarded from *Manchester* to his warehouse in *London*, and that the Defendant was entitled to retain against the estate for the general balance due from *Howarth* for the carriage of goods. This right was established by evidence of the Defendant having before claimed and been allowed to retain for his general balance both against bankrupt estates and solvent customers, and also by the evidence of a principal carrier on the western road to the same effect respecting himself.

1802.

OPPENHEIM and Another v. RUSSELL.

for the consignor to have maintained trover against the carrier or the captain of the ship. The argument drawn from the case of *Lickbarrow* v. *Mason* is unfounded; for there the holder of the bill of lading indorsed to him by the consignee of the goods was allowed to prevail against the claim of the consignor, not merely because he was a third person in the transaction, but because the consignor by putting it in the power of the consignee to indorse a negotiable instrument to a third person was himself a party to the contract with that third person, and because the holder of the bill of lading in effect claimed under the consignor as much as under the consignee. Indeed Lord *Loughborough* in giving his opinion on that case in the Exchequer Chamber, 1 *H. Bl.* 363. says, "I state it to be a clear proposition that the vendor of goods not paid for, may retain the possession against the vendee, not by aid of any equity, but on grounds of law." Could it be insisted for a moment that if *Negretti* and Co. had entered into an agreement with third persons in the country that when these goods arrived they should have them, those third persons would in consequence of such agreement have acquired a lien on the goods for money advanced by them paramount to the consignor's right of stoppage *in transitû*? If this doctrine prevail, no person can ever send goods by a carrier until he has previously examined the carrier's books and ascertained the extent of the consignor's debts to the carrier. The case of *Dawes* v. *Peck* proceeded on the ground of a delivery to a special carrier. It is not to be denied that carriers may make a special contract with those for whom they carry goods, and that notice to a party of such usage is evidence of an implied contract; but it is only evidence from whence a contract is to be implied and cannot be set up to defeat a lawful claim on any other ground. In the present case whatever may have been the understanding between *Negretti* and Co. and the Defendant, there is not the slightest evidence of the Plaintiffs having been acquainted with or assented to the Defendant's claim of a lien for his general balance.

Lens in reply observed that if these goods previous to their delivery to *Negretti* and Co. had been seized by the Sheriff under a *fi. fa.* in satisfaction of a debt due from them, the Plaintiffs could not by virtue of their right to stop *in transitû* have reclaimed the goods from the Sheriff, unless notice had been given to the Sheriff at the time he seised them of the Plaintiffs' claim.

1802.

OPPENHEIM and Another v. RUSSELL.

Lord ALVANLEY Ch. J. The question before the Court is, Whether the evidence which was offered at *Nisi Prius* was properly rejected considering for what purpose that evidence was adduced? This was an action brought by the Plaintiff as consignor against a carrier for the recovery of goods, and it is stated upon the case that the goods were demanded by the Plaintiffs before they either actually or constructively reached the hands of the consignee. According to the general rule the carrier under these circumstances was bound to deliver them and was liable, as Lord *Kenyon* very properly determined, to an action of trover if he did not deliver them. Though no act of seizure ensue, yet if tender be made of the sum due for the carriage, the person sending the goods has a right to resume them; and that was done in this case. The defence set up by the carrier is this. "It is very true I have not delivered the goods either actually or constructively into the hands of the consignee. I am a carrier and have not delivered them at the place of their destination; but I and the rest of my trade have established an usage which is evidence against all persons who make use of us as common carriers, which usage is that the person to whom goods are consigned shall not be entitled to take them out of the carrier's possession or bring an action for the non-delivery of them until he has paid not only for the carriage of those goods, but all the balance he may happen to owe for the carriage of other goods." Evidence was offered at the trial to prove this usage, in order to raise against the Plaintiff this defence, namely, that he was bound by this usage and that the carrier acquired as against him and his right of stopping *in transitû* the same right of detainer as against the consignee. I am now satisfied that I ought to have admitted that evidence for the purpose of proving the usage, if when proved it would be of any use: for whatever doubts I entertained at the trial I see that by an authority, to which I bow, it has been determined that this sort of usage may be adduced in evidence with a view of establishing in particular trades that sort of lien which I am sorry has of late years grown so much into fashion, and has I think been too much favoured. In *Kirkman* v. *Shawcross* it was published in newspapers and all the world were apprised that a particular class of traders, such as dyers, bleachers, &c. would not take any goods to be manufactured in a particular way unless subject to a general lien as against the person sending them. But there the person sending

them

them was the person with whom the contract was made, and he had full knowledge of the usage. Indeed I think there is a great distinction between that case and the case of a carrier or an innkeeper; in the former the trader may or may not take goods to bleach at his option and nobody can compel a man to bleach for him; therefore he who sends goods to a bleacher sends them upon an implied contract that his goods shall not be redemanded by him but upon payment of the bleacher's general balance. I was of opinion that though that evidence of usage might be admissible in that case, it was inadmissible in this case, because if proved it would not affect the consignor's lien, and I am of that opinion still; and if I or my brothers had any doubts upon it we would comply with what has been suggested at the bar, namely, agree to put this case in a shape in which the question might be finally determined; but as we have no doubts at present and as it is a case of little consequence in point of value, we shall in the present stage deliver our opinions, and if the parties are desirous of having this point more solemnly determined, they may bring it forward in a case of more importance. We are called upon to say that this usage set up by the carriers on the western road ought in point of law to prejudice that right which is now as firmly settled and as much a legal right as any other; namely the right of a consignor who has delivered goods to a common carrier to reclaim those goods before they have come into the actual or constructive possession of the person to whom they are addressed. I confess I thought the proposition a monstrous one when first stated; and I still think it impossible to maintain that an agreement between the consignees of goods and the carriers upon the western road can put an end to the right of stopping *in transitû* vested in the consignors of goods before that agreement existed. It was admitted that if the consignee had made an assignment of the goods, his assignee could not have defeated the rights of the consignor. Then if he could not do it by assignment how can he by any agreement with the carrier? for the carrier comes in under the consignee. In the argument the rights of third persons were pushed forward: and most unquestionably they cannot be affected by the right of the consignor to stop *in transitû*; for if by any thing that had happened to the goods where they were deposited any person had acquired a right in those goods before they became the property of the consignee, the consignor could not have resumed them without satisfying that right; but he can resume them without

1802.

OPPENHEIM and Another v. RUSSELL.

1802.

OPPENHEIM and Another v. RUSSELL.

satisfying any rights derived under the consignee, if he claim to resume them before they come into that situation which gives the consignee a complete dominion over them. Perhaps there is a little difficulty in stating the several rights of consignor and consignee. It has been determined that the moment goods are delivered by *A.* to a common carrier to be by him forwarded to *B.* the property vests in *B.*, and if they are lost he, not the consignor, is the person to bring an action for that loss. This it was contended decides the present point. But we must recollect that though the property be in the consignee still it is liable to be divested by the consignor under certain circumstances, and when the right of resumption is exercised by the consignor the property is revested in him. Though the consignee be the person who must sustain any loss happening to the goods and therefore the carrier is principally his agent, still he is so far the agent of the consignor, that the law has said, the consignor has a right to take the goods out of the hands of the carrier at any time before delivery to the consignee. My brother *Lens* put a case which I do not think so clear as he seemed to consider it, namely, that if the Sheriff had found these goods upon the road and seized them under a *fi. fa.* in satisfaction of a debt due from the consignee to a third person, the consignor's claim to resume the property after such a seizure could not have availed him. Whether the Sheriff can make them absolutely the goods of the consignee by stopping them before they come to his hands, appears to me very doubtful. At any rate that is not the present case. Here neither the consignee nor any body claiming under the consignee had attempted to reduce the goods into actual possession before the claim of the consignor. They remained therefore in the hands of the carrier in the same state as when they were first delivered. There is no evidence whatever in this case of the consignor having had any actual notice that this Defendant as a carrier would take no goods but what were liable to this new lien. Indeed my own opinion at present is that he had no right to make such terms with the consignor, and I hope it will never be established that common carriers who are bound to take all goods to be carried for a reasonable price tendered to them may impose such a condition upon persons sending goods by them. Then the single question in this case is, whether a stipulation between the consignees and carriers on the western road that the latter shall retain as against the former for

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their general balance can take away that common law right which is now firmly established, namely, that till goods have reached either the actual or constructive possession of the consignee the property in them may on certain events revert back to the person by whom they were delivered into the hands of the carrier? The carrier's claim here is in contravention of that right; for there is no third person to whom any right is derived from the consignor. With respect to the argument adduced from the decisions in favour of indorsees of bills of lading, it is to be observed that in those cases the consignor himself had enabled the consignee to raise money upon his goods, and it would have been monstrous to permit the consignor after a credit obtained by means of his own bills of lading to take the goods out of the hands of an assignee in fact claiming under himself. Under these circumstances therefore I am of opinion that the evidence offered was not admissible for the purpose for which it was offered.

Heath J. I am of the same opinion, and I found my judgment upon a few principles which I think steer clear of most of the cases cited. In the first place it is clear I think that the right of seizing *in transitu* by the consignor is a common law right; and that it is so is evident, because it may be the foundation of an action of trover. In the next place I think it is a right arising out of the ancient power and dominion of the consignor over his property, which at the time of delivering his goods to the carrier he reserves to himself. Then the third principle I shall lay down is this, without impeaching any of the cases which have been adjudged, that there is a certain privity of contract between the consignor and the carrier; and it is evident that there is that privity of contract from this consideration, that if for instance the consignee has run away and cannot be found, or if the consignee will not take to the goods, but will say "I did not order these goods," or "I countermand them and will not accept them," in either of these cases the carrier may come upon the consignor for the carriage of the goods, which he could not do unless there was a privity of contract between him and the carrier. Then if this is a power reserved out of the ancient dominion the consignor has over his property, it is paramount to any sort of agreement as between the carrier and consignee. As I put the case just now, suppose the consignee is not to be found to receive the goods, could the carrier in such a case say "there is a running account between

1802.

Oppenheim and Another v. Russell.

me and the consignee, and therefore I will make you the consignor pay the consignee's balance?" Certainly he could not. But if it was in the power of a carrier to create this lien, which I very much doubt as well as my Lord, he might say to the consignor "you owe me money upon another account, and you shall not have these goods unless you pay me as well for the carriage of these goods as for the running account between us in respect to the other goods." It is unnecessary for the Court at this time to deliver any opinion concerning the legality of this lien, or how far it may properly operate, but I think it is an extremely doubtful matter for the reasons my Lord has given.

Rooke J. This right to stop the goods *in transitû* I must consider as a legal right. Our courts of common law recognise it, and they distinguish between the constructive and the actual delivery of goods. This distinction is mentioned by Mr. Justice *Buller* in delivering his opinion in the case of *Ellis* v. *Hunt*.[*] Where there is an actual delivery the *transitus* is at an end, but where the delivery is constructive or fictitious, there the law considers that as a delivery to certain purposes only; for it is a fiction of law, and that fiction of law must work equity. Now the fiction is this, that it is a delivery so far as to make the carrier answerable to the consignee, to whom he has undertaken to carry them; but the fiction is never carried so far as to deprive the consignor of his right to resume them, if stopped before they have actually got to the possession of an insolvent consignee. This is an equitable and just right. But I can never assent to a doctrine so discreditable to our courts of law as that, because it is equitable and just, that it is therefore not strictly legal. Though a just and equitable right, it is a legal right too, and not a right which needs the aid of a court of equity. Then, what is the claim set up by the Defendant? It is a claim founded on a special agreement only. I call it a special agreement for this reason, that it is not founded on general principles of justice, but on particular usage. That usage is presumed to have been founded on contracts repeated so frequently and so notorious, that every body must be considered as bound to take notice of it. Supposing it therefore to be any right at all, it is a right founded only upon this sort of special agreement. If indeed it was a claim founded upon general principles of universal justice, it ought to be the law of the land, and we should not want any evidence of that which is agreeable to

law and justice. The very circumstance therefore of admitting evidence in this case shews, that it is not founded on universal right, but on special usage only. The contract itself is a very singular one: for generally speaking carriers have extricated themselves from the rules of law by making special acceptances. Now we know that a special acceptance can only be made with the consignor or his servant when he brings the goods: it cannot be made with the consignee. Nor can the consignor agree that the consignee shall not take the goods until he shall have paid the general balance; for in order to make such an agreement he must delay sending the goods until he could receive an answer whether the consignee would consent to it. It is therefore, to say no more of it, a very extraordinary case. It is not likely that the consignor would wave his own right of stopping *in transitû*, when the special acceptance was required of him: and the special agreement of the consignee ought not to bind the consignor's right of stopping *in transitû*. Then with respect to the usage itself as laid down, my Lord has made an observation very material in my view of the question, which is, that a carrier is bound to carry at all events, and the law gives him a special lien upon the goods. If the consignee is in arrear with the carrier, it is the carrier's own *laches*. Why then is he to engraft this new lien upon his own *laches*? However, if he choose to do it, and can establish the principle upon which it proceeds (to which I am by no means ready to assent) still it will be founded only on a special agreement. Now I rather think that the practice has originated thus. The carrier has carried goods to the consignee, and has refused to deliver them unless he has been paid a general balance; the answer made by the consignee has been, "Rather than have two actions I will pay the demand," for he must himself bring an action in order to recover the goods from the carrier, and then the carrier would have an action against him for the general balance; and rather than submit to two actions, consignees have suffered such a usage as this to creep in; and having done it in several instances, the carriers have availed themselves of it, and have published their hand-bills about town, and now they endeavour to set it up as an universal usage: but it is to be remembered, that this is an usage founded solely on their own *laches*, for they have a lien by the law of the land for the carriage of the goods. At all events however it is nothing more than a special contract between the carrier and consignee: and if it be a special contract on their

1802.
OPPENHEIM and Another v. RUSSELL.

parts, how is that special contract to interfere with the legal right allowed to the consignor of stopping *in transitû*? I think the common law right of the consignor is paramount, and it shall not be affected by a special agreement between the consignee and the carrier, even supposing that such an agreement could be established. This I say without giving a direct opinion whether that agreement may or not be established by evidence. Then the question directly before the Court is, Whether a new trial should be granted because the evidence has not been received? If it were a question merely as between consignee and carrier, to be sure this evidence should have been received, and then the Court would have had to decide upon the legality of this special usage between the parties: but if it cannot affect the right of third persons it was useless to receive it; and being useless in this case, I am of opinion with my Lord Chief Justice and my brother *Heath* that no new trial should be granted.

CHAMBRE J. I think this modern doctrine of altering the liability to which the common law subjects parties and vesting in them new rights by presumed agreements arising from the publication of certain notices, has been extended as far or rather farther than it ought to be upon principles of public policy. If the doctrine were to be carried the length which was intimated when this rule was first applied for, the consequences would be monstrous; but that a notice published by carriers in hand-bills or in the public papers is to subject the goods of every man who happens to employ a carrier to the payment not only of the price of the carriage or to any debt which he himself may owe on the score of carriage to that carrier, but to the debts of another man is so manifestly unreasonable and so monstrous that I think no legal agreement can be implied from such a notice. Indeed that point seems now to be pretty much abandoned, and the right which the carrier claims in this instance he endeavours to derive from the consignee himself. It is going a good way to bind even the consignee of goods by an agreement of this kind: for goods may be sent without his choosing any carrier or directing by whom they are to come. He orders goods generally and yet he is to be bound by an implied agreement with a particular carrier who happens to bring those goods. But it is not material to consider that question at all in this instance; the merits of this particular case have been so fully entered into by my Lord and my brothers, who

1802. OPPENHEIM and Another v. RUSSELL.

who have already ſpoken, that I ſhall be very ſhort in what I have to obſerve upon this ſubject. I will take it for granted upon this occaſion (though perhaps it is not very fully proved) that the delivery to the carrier was to all intents and purpoſes a delivery to the conſignee, that is a qualified not an abſolute delivery, but that ſort of delivery which would entitle the conſignee to have brought his action againſt the carrier for the loſs of his goods, and is a good delivery to all intents and purpoſes excepting that of defeating the right of the conſignor to ſtop *in tranſitû*. In the caſes which have been decided, particularly in the laſt caſe in the Court of *King's Bench*, there has been what the Court conſidered as a ſpecial direction with reſpect to the carrier who was to bring the goods. The Court ſeemed to conſider that as a delivery under the ſpecial order of the conſignee, and the deciſion goes a good deal upon that ground. But I would ſuppoſe upon this occaſion that as the goods muſt come by land carriage it was ſufficient to deliver them to any carrier coming from the place from whence the goods were ordered, and that there was a complete delivery to the conſignee; that is, ſuch a delivery as I before ſtated. Now it is contended on the part of the carrier, firſt of all that this right of ſtopping *in tranſitû* is a right in equity. I do not know what is meant by that argument. If it be a right in equity every thing done in Courts of Law to enforce this right has been wrong. It is argued indeed that it is a legal right founded upon equitable principles; but that does not ſeem to be a very preciſe definition of the right. Then it is contended that this right is not to affect the right of third perſons. No propoſition can be more true, but is it true that it does affect the right of third perſons? It is ſaid that the conſignee has notice of the conditions upon which the carrier received the goods; be it ſo; but in that caſe the carrier muſt derive his right from that conſignee. Can he have a greater right than the conſignee himſelf has? if he derive his right from the property he ſuppoſes to be veſted in the vendee he can have only a ſimilar intereſt in the property with the vendee. It is beyond all queſtion that the carrier has a lien for the labour that he has beſtowed as againſt the conſignor in the carriage of the particular goods; that lien is ſatisfied, the money having been tendered to him and he having refuſed to accept it. Now what pretence is there to go farther, even if it were admitted that by publications of this ſort carriers could affect the conſignor? I do not

1802.

OPPENHEIM and Another v. RUSSELL.

think the notice published upon this occasion goes the length of affecting the consignor beyond that lien which the carrier has for the carriage of the particular goods. The notice is only in general terms that the goods shall be subject to the general balance due from the respective owners. If we take it to be a lien upon the general balance due from the consignor, there is no pretence for any lien beyond the carriage of these particular goods. Taking it to be a lien for the general balance due from the consignee, then it can only be a lien subject to the right of the consignor to stop the goods *in transitû* in consequence of the insolvency of the consignee. This case has been compared to the case of the consignment of a bill of lading. To be sure two cases can hardly be stated more dissimilar. A consignee by a bill of lading receives what is considered as a kind of negotiable interest and for a valuable consideration; here there is no consideration to the consignor for extending the lien. A consignee of a bill of lading may for a valuable consideration negotiate that instrument. Whence does that arise? From the usage and custom of merchants. Where is the usage and custom respecting the trade of a carrier to authorise this lien? In the former case there is an instrument under the hand of the consignor himself, and the consignee acts as his agent in the disposition of the property: it is an assignment by the consignor himself. The most colourable argument in my mind that has been used upon this occasion is that which was not mentioned till the reply, comparing this case to the case of a creditor of the consignee taking goods in execution upon their passage. It is assumed that the creditor has that right, but if he has it I still do not think that the cases are similar. Perhaps the consignee himself may intercept the goods in their passage, and indeed I have little doubt but that if he do intercept them in their passage before the consignor has exercised his right of stopping *in transitû* and do take an actual delivery from the carrier before the goods get to the end of their journey, that such a delivery to him will be complete, and I will not say but that his creditors in the case of an execution against him for his goods may not do the same thing. No authorities however are cited to prove that they may. But supposing that they may, still I do not think it applies to this case, for the creditor under an execution takes the thing absolutely to sell and dispose of as the consignee himself would have done; but the carrier does not so take it, for he

he has no absolute property in the goods but only a lien. What is the nature of the possession of a carrier? He has no absolute right in the property, he has only a lien. Then the question returns, What is the nature of the carrier's lien while the goods are *in transitû*? I conceive his lien cannot, as against the consignee, extend any further than to entitle him to be paid for his carriage of the particular goods, but by the lien the right of the consignor to stop the goods *in transitû* is not defeated. For these several reasons and for those which have been urged by my Lord and my brothers who have spoken before me, I am perfectly well satisfied that the judgment in this case should be given for the Plaintiffs. As to the rejection of the evidence the only use that could have been made of that evidence would have been to prove that as against the consignee the carrier had a lien.

Judgment for the Plaintiffs.

EAGLETON v. The EAST INDIA COMPANY.

Feb. 10th.

The sales of the *E. I.* Company being subject to a regulation that any buyer not making good the remainder of his purchase money on or before the day limited for such payment should forfeit the deposit, "and should be rendered incapable of buying again at any future sale until he shall have given *satisfaction* to the Court of Directors;" Held that the term *satisfaction* must be construed to mean pecuniary compensation for the non-performance of his agreement to pay on the appointed day, and that a buyer having made default on the day, but afterwards within a further time given to him by the *E. I.* Company paid the remainder of the purchase money with interest, might maintain an action against the *E. I.* Company for refusing to allow him to become a bidder at their sales, such sales being by 9 & 10 *W.* 3. *c.* 44. *f.* 69. declared to be public and open sales.

Quære, Whether since the passing of 18 *Geo.* 2. *c.* 26. which regulates the deposits, forfeitures, and incapacities of bidders at the tea sales of the *E. I.* Company, the *E. I.* Company can make or enforce any other regulations affecting those sales than such as the act of Parliament has enacted?

THIS was a special action on the case brought by the Plaintiff to recover damages against the *East India* Company for refusing to declare him the best bidder for certain teas put up to public sale by the Company, and for refusing to accept the deposit upon such biddings, or to sell him the said teas.

The first count of the declaration stated, that the Plaintiff had for a long time carried on the trade of a tea-dealer, and as such had been used to bid for and buy large quantities of tea at the public sales of the *East India* Company, and to sell the same again to his customers, and thereby to gain great profit; that he was lawfully entitled to become such bidder and buyer, and that on the 17th of *June* 1801, the *East India* Company had a public sale of tea by inch of candle, and the plaintiff did bid for divers

lots,

1802. EAGLETON v. The EAST INDIA COMPANY.

lots, to wit, &c. (setting out the lots) and became the best bidder for the same, and that the *East India* Company of right ought to have declared him the best bidder; but that they well knowing the premises, and intending to injure him, refused to declare him the best bidder for the same, or to sell the same to him, but sold them to other persons to him unknown; and although the Plaintiff at the time when according to the form of the statute in that case made and provided the deposits upon the teas sold at the said sale ought to have been made to wit, on, &c. tendered to the *East India* Company his deposits in that behalf, to wit, at, &c. they refused to receive the same. The second count was in the same form as the first, but related to different lots; and was followed by an allegation of special damage, stating, that by reason of the premises the Plaintiff was deprived of the teas, and of great advantage which would have arisen to him in case the *East India* Company had sold them to him as of right they ought to have done, and was prevented from carrying on his trade in as beneficial a manner as he might otherwise have done. The third count was for refusing to declare him the best bidder for other lots of teas, or to sell the same to him. The fourth and fifth counts were for refusing to sell other lots to the Plaintiff, for which he had become the best bidder. And the sixth count was in trover for 500 chests of teas.

The Defendants pleaded the general issue—Not Guilty.

The cause came on to be tried at the *Guildhall* Sittings after last *Trinity* term before Lord *Alvanley* Ch. J. when a verdict was found for the Plaintiff, damages one shilling, subject to the opinion of the Court upon the following case:

The Plaintiff is a tea dealer and a subject of *Great Britain*, and as such accustomed to bid for and buy teas at the public sales of teas of the *East India* Company, and to sell the same again in the course of his trade. The *East India* Company having put up teas for sale in the manner stated in the declaration, the Plaintiff was the best bidder at those sales for the teas specified in the declaration. The *East India* Company refused his biddings, or to sell him the teas, and the same were sold to other persons. The Plaintiff tendered the deposits as stated in the declaration, and the *East India* Company refused to accept them. At the sales to which the declaration relates, and at all previous sales as far back

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as before the paſſing of the 18 *Geo.* 2. *c.* 26. conditions of ſale had been publiſhed as follows, *viz.*

The United Company of Merchants of *England* trading to the *Eaſt Indies* do hereby declare, that the goods by them put up or expoſed to ſale during the continuance of this preſent ſale, are ſo expoſed by them to ſale upon the terms hereinafter mentioned, and upon ſuch other terms as ſhall be expreſſed in the catalogues; and every reſpective buyer is to take notice, that whatever goods he ſhall buy or contract for at the preſent ſale, the ſame and his contract relating thereto, are to be ſubject to the terms, conditions, and agreements hereafter declared, and to ſuch other terms, conditions, and agreements, as ſhall be expreſſed in the catalogue of ſuch goods. (Here followed the conditions of ſale at length, the material parts of which were theſe). "And in caſe any buyer or buyers of goods, tea excepted, which is provided for by act of Parliament, ſhall make default in payment of his or their depoſit, the goods ſhall be as ſoon after as convenient reſold, and the difference in price, if any, and expences be made good by the firſt purchaſer, who ſhall alſo be rendered incapable of buying again at the Company's candle. And in caſe any buyer ſhall not make good the remainder of the purchaſe-money on the goods which ſhall be bought by him on or before the day limited for payment thereof, the depoſits which have been paid upon the ſame ſhall be forfeited to the Company, and ſuch buyer ſhall be rendered incapable of buying again at any future ſale, until he ſhall have given ſatisfaction to the Court of Directors. Such perſon or perſons as cannot make themſelves known to the Court of Directors' ſatisfaction, or to the major part of the Directors preſent at this ſale, ſhall forthwith make a further depoſit to ſuch amount as ſhall be required by the Directors in part of payment for the goods by him or them bought; and in default thereof ſuch perſon or perſons ſhall not be nor be allowed to be a buyer or buyers of any goods at this ſale."

At ſome ſales previous to thoſe mentioned in the declaration, and after the publication of the above conditions, the Plaintiff had been declared the beſt bidder upon many lots, and had paid his depoſits upon thoſe ſales agreeably to the acts of Parliament and conditions above mentioned, but had neglected to make good the remainder of the purchaſe-money on the goods which he had ſo bought. On application being made to the *Eaſt India* Company,

1802.

EAGLETON v. The EAST INDIA COMPANY.

they did not insist on the forfeiture of the deposits, but gave the Plaintiff time to pay the remainder of the purchase-money on the said goods. The Plaintiff afterwards paid the purchase-money with interest within the time so given: but the *East India* Company at the time of waving the forfeiture of the deposits, and giving the Plaintiff time as aforesaid, and receiving the payment as aforesaid, declared to the Plaintiff that he should not be permitted to bid at any future sale, until he made satisfaction to the Company, which he hath never done, nor agreed to do, being determined to contend that the condition was illegal; the Plaintiff was in consequence of such non-payment forbidden the sales of the Company, and his name as a defaulter so forbidden was declared in the usual and accustomed manner. The Plaintiff was not in arrear to the *East India* Company at the time of the biddings and refusals mentioned in the declaration.

The question for the opinion of the Court was whether the Plaintiff was entitled to recover?

Best Serjt. for the Plaintiff. The point arising upon this case is of the greatest magnitude, since it involves this important question Whether the whole produce of the *East Indies* be under the absolute control of the *East India* Company? It is the policy of the law of *England* to look upon all monopolies with a jealous eye; and there never was any monopoly which stood so much in need of salutary restraint as that of the *East India* Company on account of its enormous extent. By the 9 and 10 *Will.* 3. *c.* 44. *s.* 69. it is provided, that all goods of the Company imported into *England* shall be sold publicly and openly by inch of candle upon pain of forfeiting the same; and by the charter of the 10 *Will.* 3. granted in pursuance of the said act, the anxiety of government is strongly shewn to prevent any abuse of the monopoly thereby granted, since it is by that charter expresly required and commanded that all goods imported by the Company shall be openly and publicly sold by inch of candle pursuant to the said act upon pain of incurring the King's highest displeasure. Without this provision the Company would have been enabled to exercise their monopoly to the prejudice of the community, by exacting exorbitant prices for their commodities. But it having been deemed expedient to vest the right of trading to the *East Indies* in the Company, to the exclusion of all the other subjects of the King, it is provided as a compensation for this exclusion that every subject

1802. EAGLETON v. The EAST INDIA COMPANY.

ject ſhall have a right to purchaſe the commodities imported by the Company at public and open ſale. By the act of Parliament therefore a right is veſted in every ſubject of the realm to purchaſe at the Company's ſales, which right no authority inferior to that of Parliament can diveſt. If then no power but that of Parliament can take away this right, no other power can abridge it: conſequently the article in the conditions of ſale, which excludes every perſon from the right of bidding who has once failed in completing a purchaſe made by him at any former ſale, is abſolutely void. It may be ſaid that the direction of the ſtatute to ſell by auction implies a power to impoſe regulations. But a regulation conſiſts in aſcertaining the mode in which a thing is to be done, whereas theſe conditions exclude certain perſons from doing the thing at all. If a merchant import goods the King may refuſe to ſuffer him to land his goods until he has paid the cuſtoms; but the King cannot make an order, that if any merchant once land goods without paying the cuſtoms he ſhall for ever be forbidden to land any more; and yet what the King could not do in that caſe, the *Eaſt India* Company ſeek to do in this. Neither can the Company be compared to a private individual ſelling goods by auction, to whom it is competent to inſert in his conditions of ſale that ſuch and ſuch perſons ſhall not be allowed to bid; for a private individual may refuſe to ſell at all, whereas the Company are bound both by their charter and by act of Parliament to ſell by public and open ſale. It may be collected from ſeveral acts of Parliament ſubſequent to the 9 and 10 *Will.* 3. that the Legiſlature did not underſtand any ſuch power as that which has been exerciſed by the Company to be veſted in them. It is ſtated in the caſe that the article in queſtion was publiſhed in the conditions of ſale as far back as before the ſtatute 18 *Geo.* 2. *c.* 26. Now the 7th ſection of that act, after reciting that many perſons bid for tea at the ſales of the Company without intending to pay for the ſame unleſs the price ſhould riſe, enacts, that all perſons who become the beſt bidders ſhall make a depoſit of 40*s.* for every tub and cheſt of tea within three days, on pain of forfeiting ſix times the value, and declares, that all perſons neglecting to make ſuch depoſit ſhall thereafter be incapable of bidding at the Company's ſales. Had the Company been empowered to make ſuch a condition, the interference of the Legiſlature on this occaſion would have been unneceſſary; but the inference to be drawn from this legiſlative

1802.

EAGLETON v. The EAST INDIA COMPANY.

regulation is, that the terms inserted by the Company in their conditions were thought improper, but that some restrictions being necessary, the Legislature adopted that which is stated in the act. The 13 *Geo.* 3. *c.* 44. *f.* 2. which introduces a similar regulation with respect to Bohea tea affords a similar ground of argument. With respect to these two acts, indeed it may be said that they are revenue acts; and not being made with a view to the interest of the Company, afford no sufficient ground to argue against the power of the Company to have made the same regulations. But this observation does not apply to the 33 *Geo.* 3. *c.* 52. *f.* 161. in which the two former acts are recited, and the times of paying the deposits are regulated. Perhaps it may be argued, that unless this regulation were established, an insolvent person might become the best bidder at the sales; but it having already been provided by act of Parliament that the best bidder shall make a deposit, that circumstance is sufficiently obviated: at least it is not competent to the Company to say that the provisions of the Legislature are inadequate to the purpose for which they were made. Even supposing that these conditions of sale could be considered as a by-law they would be void for many reasons. First they are a restraint upon trade; since they do not only regulate the manner in which the trade shall be carried on, but in certain cases restrain persons from carrying it on at all. Thus in *Harrison* v. *Godman*, 1 *Burr.* 12. a by-law of the City of *London* obliging all butchers though free of the city to become members of the Company of Butchers was holden bad. So it is said 1 *Bl. Comm.* 476. that a trading Company cannot make a by-law against the common profit of the people: and in *Com. Dig.* tit. *Trade D.* 2. that a by-law for the total restraint of trade is bad. Secondly, a by-law to exclude a person altogether from the exercise of a legal right is void. Thus it is said, in the Chamberlain of *London*'s case, 3 *Leon.* 264. that although a commoner may be obliged by a by-law to exercise his common at certain times only, yet a by-law to exclude a commoner from his common is bad. And in *Rex* v. *Spencer*, 3 *Burr.* 1827. a by-law restraining the persons entitled to elect common-council-men, to such of the commonalty as had executed parochial offices, the right of election having previously been vested in all the commonalty, was declared to be void. Thirdly, a corporation cannot bind any by a by-law but its own members. Therefore a by-law made by the University of *Oxford* shall not bind a townsman; *Dodwell* v. *The*

1802. EAGLETON v. The EAST INDIA COMPANY.

University of Oxford, 2 *Vent.* 33. It may perhaps be contended however that the plaintiff by bidding at the sales of the *East India* Company has contracted to purchase upon the terms published by the Company; but in answer to this it may be observed, that a contract entered into by any one restraining him from exercising his trade altogether is void. *Thomson* v. *Harvey*, 1 *Show.* 2. and *Mitchell* v. *Reynolds*, 1 *P. Wms.* 187. Now the present Plaintiff cannot carry on his trade otherwise than by purchasing the commodity in which he deals at the sales of the *East India* Company. At any rate the terms imposed by the Company ought to be plain and unequivocal, and such as leave no discretion in the Company, because the forfeiture to be incurred may otherwise be made an engine of oppression on particular individuals instead of a wholesome regulation of the trade. Indeed no precise meaning or definite idea can be affixed to the terms "giving satisfaction," used in these articles of sale, and the present case strongly shews the uncertainty they involve, since though it is admitted that the Plaintiff has paid all the money which was owing to the Company, together with interest for the time from which he made default, still he is stated not to have made satisfaction to the Company. In a court of law however no other satisfaction than pecuniary satisfaction can be contemplated; and the Plaintiff having made that satisfaction, has fully complied with the terms of sale whether legal or illegal, which the *East India* Company have thought fit to impose.

Bayley Serjt. for the Defendants. Though the *East India* Company are bound by the 9th and 10th *W.* 3. to sell all goods imported by them by public and open sale to the best bidder, yet they are not precluded from imposing such conditions and regulations as they find necessary for their own security. Indeed considering the extent to which these sales are carried on, and that the Company are bound to convert all their funds into money by these means for the purpose of satisfying the claims of their creditors, their proprietors, and of government, it is highly necessary that such regulations should be imposed as will insure the completion of those purchases for which any person may bid at their sales. The very obligation to sell by public sale implies a power to regulate that sale in such way as shall be found most convenient. There is a manifest distinction between a condition of sale excluding a trader on account of some act done by him previous to the sale, and a condition excluding him for some act done

1802.

EAGLETON v. The EAST INDIA COMPANY.

done either at or after the sale of the consequences of which he was fully apprised before the time of sale. Previous to the 18 *Geo.* 2. no objection could be raised to these conditions, and as they have existed without objection from that time to the present it affords a strong argument that they are reasonable. Indeed the Legislature thinking these regulations not sufficiently effectual, by the 18 *Geo.* 2. imposed new regulations of sale carrying the conditions further; and neither that statute, nor the 13 or 33 *G.* 3. interfered to render void these articles of sale imposed by the Company, though at the time when these acts passed for the regulating the sales of the *East India* Company, these articles were in full force. It must be inferred therefore that the Legislature approved them. With respect to the discretion vested in the Company by the general term "satisfaction" used in the articles of sale, it may be observed that such discretion was necessarily given to the *East India* Company in order that they might be able to relieve from the rigour of the condition such individuals as had incurred the forfeiture not by any fault of their own but by unforeseen circumstances, and were therefore deserving of relief; at the same time leaving to them the power of excluding from their sales such persons as had wilfully and with improper views offended against the regulations. In this view of the subject the term "satisfaction" no longer remains ambiguous, and may well be construed to be that satisfaction which arises not from a pecuniary compensation, but from a fair and reasonable excuse offered for a conduct on the part of the bidder capable of being very injurious to the interests of the *East India* Company.

Cur. adv. vult.

The opinion of the Court was this day delivered by,

Lord ALVANLEY Ch. J. This case of *Eagleton* v. *The East India Company* arises out of an injury alleged to have been sustained by the Plaintiff in having been prevented from doing that to which he claims a right, namely to become a bidder at the public sale of the *East India* Company. The case is shortly this. By an act of the 9th and 10th *William* 3d, which was passed soon after the institution of the *East India* Company and the granting of that monopoly which they still possess, it was enacted, "That all goods and merchandizes belonging to the Company to be erected as aforesaid, or any other traders to the *East Indies*, and which shall be imported into *England* or *Wales* as aforesaid pursuant

1802. EAGLETON v. The EAST INDIA COMPANY.

ſuant to this act ſhall by them reſpectively be ſold openly and publicly by inch of candle upon their reſpective accounts and not otherwiſe." It ſeems that the Legiſlature at the ſame time that they gave a monopoly to the *Eaſt India* Company, thought it neceſſary (as it certainly was) to ſecure to the ſubjects of this country a free and equal opportunity of becoming bidders at public ſales of thoſe commodities which the *Eaſt India* Company alone for a time could import. The neceſſity of ſuch a regulation was obvious; otherwiſe it would have been in the power of the *Eaſt India* Company to have preferred themſelves and their friends; and in ſhort to have ſecured to themſelves all the benefits of a monopoly, and to have excluded the ſubjects of this country from thoſe advantages to which they were entitled. The regulation therefore appears to me to have been founded in neceſſity and to be ſuch a regulation as the laws of this country will ſee ſtrictly enforced. Notwithſtanding this proviſion however it appears to me abſolutely neceſſary that the *Eaſt India* Company ſhould be armed with powers to make regulations reſpecting thoſe ſales. All that the act requires is that they ſhall be fair and impartial public ſales; it does not define under what terms and regulations thoſe ſales ſhall be conducted, only that it ſhall be public ſales by inch of candle, that is to ſay, public ſales at which the beſt bidder ſhall be the purchaſer and open to all his Majeſty's ſubjects; and provided that object is obtained the *Eaſt India* Company are certainly at full liberty to make ſuch reaſonable regulations reſpecting the ſame as ſhall be neceſſary to make them effectual. A ſale by public auction does not *ex vi termini* require that any depoſit ſhould be made or any time given to the purchaſer; it might have been competent for the *Eaſt India* Company, if they had thought fit, to require that the purchaſer ſhould pay down the whole purchaſe money the moment that the bidding was declared; for there is nothing in the nature of an auction that requires any time to be given for the completion of the purchaſe. But for the accommodation of the public and the purchaſer it has always been found neceſſary that the payment of the whole money ſhould not be inſiſted upon; accordingly the *Eaſt India* Company (though at what time does not appear, and indeed if the judgment of the Court depended upon the time at which the regulations which are now in force were firſt made I ſhould deſire the caſe to be more accurately ſtated)

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1802.

EAGLETON
v.
The
EAST INDIA
COMPANY.

framed those regulations which are now acted upon. The case however states that at some time before the passing of the 18 *Geo.* 2. the regulations under which the *East India* Company now act took place; but how long before the passing of that statute we are not informed; all we learn is that these regulations had before that time been made by the *East India* Company, and the regulations as far as they relate to the present question are these: "And in case any buyer or buyers of any goods (tea excepted which is provided for by act of Parliament) shall make default in payment of his or their deposit the goods shall be as soon after as convenient resold, and the difference in price, if any, and expences be made good by the first purchaser, who shall also be rendered incapable of buying again at the Company's candle;" then they proceed, "And in case any buyer shall not make good the remainder of the purchase money on the goods which shall be bought by him on or before the day limited for the payment thereof, the deposits which have been paid upon the same shall be forfeited to the Company, and such buyer shall be rendered incapable of buying again at any future sale until he shall have given satisfaction to the Court of Directors; and such person or persons as cannot make themselves known to the Court of Directors satisfaction or to the major part of the Directors present at this sale shall forthwith make a further deposit, to such amount as shall be required by the said Directors in part of payment for the goods by him or them bought, and in default thereof such person shall not be allowed to be a buyer of any goods." Now it is said that with the exception of these words "tea excepted," which could not have been introduced before the statute, similar regulations had taken place and have ever since been continued; if that be so I am now to consider what the Legislature could have meant when they passed the 18 *George* 2. supposing as the Counsel for the Defendants would wish us to suppose that they had before them at the time that they passed this act the regulations then subsisting and affecting all things whatsoever; whether it was that the Legislature did not advert to any regulations; whether they took no cognizance of them, or whether they thought they were deficient we cannot tell; we have no judicial knowledge and we are not to conjecture. But we find that in 18 *George* 2. (a considerable time after the 10 *William* 3.) a new regulation took place;

 whether

1802.

EAGLETON v. THE EAST INDIA COMPANY.

whether the Legiflature had or had not approved of the former regulations, or whether they thought the *Eaft India* Company wanted authority to enforce thofe regulations, we cannot tell; but for fome reafon or other, the Legiflature thought fit not to leave the regulations refpecting the article of tea to the *Eaft India* Company but to make regulations themfelves and give the fanction of the Legiflature to them; and therefore it is enacted in thefe words, and they are well worthy confideration: "Whereas many perfons do frequently at fales for tea by the faid United Company bid for and are declared beft bidders for large quantities of tea without intending or being able to pay for the fame, unlefs fuch teas fhould after fuch fales rife in price, by means whereof the prices of tea are frequently raifed and the running of tea will be encouraged, for remedy thereof be it enacted, that every perfon who fhall at any public fale of tea made by the faid United Company be declared to be the beft bidder fhall within three days after being fo declared the beft bidder for the fame depofit with the faid United Company or their clerk or officer appointed for that purpofe, forty fhillings for every tub and for every cheft of tea, and in cafe any fuch perfon fhall refufe or neglect to make fuch depofit within the time before limited, he fhall forfeit and lofe fix times the value of fuch depofit directed to be made as aforefaid, and the fale of all teas for which fuch depofit fhall be neglected to be made as aforefaid, is hereby declared to be null and void, and all fuch teas fhall again be put up by the United Company to public fale within fourteen days after the end of the fale of teas at which fuch teas were fold, and every buyer who fhall have neglected to make fuch depofit as aforefaid fhall be and is hereby rendered incapable of bidding for or buying any teas at any future public fale of the faid United Company." Now if I had not been told by the cafe that there were already exifting regulations which affected tea as well as all other articles, and which regulations had put it into the power of the *Eaft India* Company to have effectually prevented any fuch mifchief as the Legiflature recites, I fhould have fuppofed that mifchief to have been altogether without remedy. But it appears that the Company had before the 18 *Geo.* 2. a right to afk what depofit they pleafed, and if they did not like the party to make him pay a further depofit. However the Legiflature did not think fit to truft the Company with refpect to this article of tea; and a very great queftion arifes,

 whether

1802.

Eagleton v. The East India Company.

whether the 18 *Geo.* 2. has not put an end to any regulation respecting tea whatsoever; and whether as the Legislature has taken that entirely to itself, the *East India* Company are at liberty with respect to the subject of tea to make any further regulations? It is an extraordinary thing that the Legislature seeing the mischief and being anxious to prevent it should stop so short. I do not mean to give it as my opinion that the 18 *Geo.* 2. does take away the power of the *East India* Company to make regulations after a deposit has been made; but I think the best way would be to have recourse to the Legislature to sanction all their regulations as well with respect to tea as other articles of sale and to put them upon such a footing that there can be no mistakes or misapprehensions in future. This being the case, and the regulations being made with respect to the excepted article of tea, I think a very great doubt may arise whether the latter part of the regulations relates to tea. Now this is an action for not being permitted to become a bidder for tea. If we look over the regulations, we shall find that when they come to speak of the deposit they say, "in case any buyer or buyers of any goods (tea excepted, which is provided for by act of Parliament) shall make default in payment of his or their deposit, the goods shall be as soon after as convenient resold, and the difference in price, if any, and expences be made good by the first purchaser, who shall be rendered incapable of buying again at the Company's candle;" and then they go on with these words, "and in case any buyer." It is contended, that the word "buyer" there relates as well to the buyer of tea as other articles, notwithstanding the exception. On that point I have great doubts, especially when I come to read the third clause, which cannot possibly apply to tea, because the Legislature have told the *East India* Company what deposit they are to have for tea; and the third regulation is "That such person or persons as cannot make themselves known to the Court of Directors satisfaction, or to the major part of the Directors present at this sale, shall forthwith make a further deposit." Now there is no pretence to say that with respect to tea the *East India* Company have a right to require any further deposit than that which the act requires; and therefore it appears to me it might fairly be contended, that a purchaser at that sale might say, I consider these regulations as having nothing to do with tea; and therefore the Company could not when they speak of "buyers" in the latter part of their regu-

lations

1802.
EAGLETON v. THE EAST INDIA COMPANY.

lations mean the buyers of tea, but only the buyers of other goods. Taking it for granted however that these regulations did relate to tea (except with respect to the deposit, which it is clear must rest upon the act), it is remarkable that the Legislature did not choose to trust the *East India* Company with the sole power upon that point, for they have given the action as to the forfeiture of six times the value to any informer; and they have gone on to declare that which the *East India* Company thought they had a right to add as a penalty to their own regulations respecting other goods, that the person making default shall be excluded for ever from bidding at the Company's sales. I will not enter into the question whether the exclusion from any future sale be or be not a reasonable regulation? We are all clearly of opinion; that in matters where the Company is not restrained by Parliament they have a right to make reasonable regulations; but it will always be a question whether their regulations are reasonable or not. Undoubtedly the Company is not at liberty to direct that any individual shall be forever excluded, merely if they think fit so to direct; they may annex such conditions to their sales as are consistent with the obligation they are under to make them public sales, indifferent and open to all bidders; whatever regulations therefore they make, must be regulations not depending upon their sole will and pleasure, not to be enforced or relaxed by that rule only; for if such regulations be allowed, they will thereby be enabled to make that which is required to be a public sale something totally different from a public sale. But we shall decide this case on a much narrower ground; for supposing all the regulations subsequent to the rule of deposit to apply as well to tea as to other commodities, and that the purchaser of tea is liable to all the penalties that the *East India* Company have thought fit to annex, we are still of opinion, that upon these words it is impossible for us to understand the term "satisfaction" in any other sense than a pecuniary satisfaction. It is true that the defaulter is to give satisfaction to the Court of Directors. But the word "satisfaction" as we understand it in a court of law must mean compensation for default occasioned by the breach of a condition. It is impossible for us, unless it were so clearly expressed as that there could be no doubt, to suppose that the word "satisfaction" means until the defaulter shall obtain the good

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1802.
EAGLESON v. The EAST INDIA COMPANY.

will and pleasure of the Court of Directors. It was said at the bar that the meaning was, until the defaulter should give them satisfaction with respect to the reasons why he did not perform the conditions. If that was meant, it had better have been as I stated before, till he shall do it with our leave and licence, leaving it open to themselves arbitrarily to grant or refuse that leave and licence. If it had meant pecuniary satisfaction, it may be argued it would not have been to the Court of Directors, but to the *East India* Company. And indeed I have no doubt that they did not understand the term " satisfaction" according to the construction which we in a court of law shall put upon it. But we are to consider whether the buyer had not a right to understand it so if he thought fit, and whether we shall exclude him for ever from a public sale, because he has become a public bidder under conditions, the legality of which may be doubted, and the words of which import, that unless he should do certain things, he should be excluded until he should have made satisfaction? Whether he had not a right to say (and I think he had) " I understood that I was not to bid again till I had made satisfaction for my default by making good all the payments with interest; those payments the Company have accepted, not in such a manner I admit as to evade the forfeiture, but in such manner as to make that satisfaction, the not making of which would subject me to this heavy penalty of being for ever excluded from that sale, which all the subjects of the country are entitled to bid at; if I had not done this the Company might have brought an action against me for the breach, and recovered such damages as a jury would give?". Upon this ground therefore, independent of other considerations, we are of opinion, that the *East India* Company had no right to exclude this man from bidding till he had given what they might think a satisfaction; but only till he should make sufficient reparation for the injury they had sustained by the breach of his agreement with them to pay certain sums of money on certain given days. If they had thought fit to impose this penalty they should have brought an action against him for not fulfilling his contract; and if he did not pay those damages which a jury might give, I should think they would have authority to exclude him, because that would not be a partial regulation, but would affect all mankind alike, and every man who did not comply would be excluded. Therefore we are of

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opinion, that under the circumſtances of this caſe this action well lies, and that the Plaintiff is entitled to recover. I heartly recommend to the *Eaſt India* Company, as well worth their conſideration, to reflect whether it would not be better that they ſhould obtain the ſanction of the Legiſlature as to the regulation of their ſales, not only with reſpect to tea, but with reſpect to all other commodities.

Judgment for the Plaintiff.

WILLIAMS *v.* BROWN.

Feb. 10th

Plaintiff agreed to ſerve as a ſeaman during a voyage to and from the *Weſt Indies*: on his arrival there he was claimed as a runaway ſlave, and delivered up to his maſter; whereupon it was agreed between the Plaintiff, his maſter, and the captain, that upon payment of a ſum of money by the captain to the maſter the latter ſhould manumit the Plaintiff, he covenanting to ſerve the captain as a ſeaman for three years at certain ſtipulated wages. The Plaintiff was accordingly manumitted, and having ſerved the captain upon the homeward voyage, commenced an action againſt him to recover wages for that voyage upon a *quantum meruit*. Held that he was eſtopped by his covenant from claiming more than the ſum ſtipulated

INDEBITATUS aſſumpſit for ſervice performed by the Plaintiff as a ſailor on board the *Holderneſs*, of which the Defendant was maſter. The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Michaelmas* Term, when a verdict was found for the Plaintiff under his Lordſhip's direction, with liberty to the Defendant to apply to the Court to have that verdict ſet aſide and a nonſuit entered. The circumſtances of the caſe were as follow. The Plaintiff, who was a negro, in *November* 1797 entered at *London* on board the *Holderneſs* bound for *Grenada* as an ordinary ſeaman out and home: on the arrival of the *Holderneſs* at *Grenada* the Plaintiff was claimed as a runaway ſlave by Mr. *Hardman* his former maſter, and delivered to him; and thereupon the Plaintiff, the Defendant, and Mr. *Hardman*, met and agreed, that on payment of 30 joes by the Defendant to Mr. *Hardman* the latter ſhould manumit the Plaintiff, which was accordingly done by a regular inſtrument of manumiſſion; and the Plaintiff on the ſame day entered into an indenture, in which deſcribing himſelf as "a free black man of the iſland of *Grenada*," he covenanted with the Defendant, his executors, adminiſtrators, and aſſigns, "to repair and go on board ſuch ſhip or veſſel as the Defendant ſhould appoint to parts beyond the ſeas, and continue on board ſuch ſhip or veſſel at ſuch place or places as the Defendant might have occaſion for his ſervices, and during the term of three years faithfully ſerve in the capacity of a ſailor or ſuch other ſervice as he ſhould be capable to do and perform as a covenant ſervant, according to the order and direction of the Defendant

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1802. WILLIAMS *v.* BROWN.

and his assigns, without departing from or leaving the said service; and the Defendant for himself, his executors and administrators, covenanted to pay to the Plaintiff for the first year 15 *l.*, for the second 20 *l.*, and for the third 25 *l.*, by quarterly payments." In consequence of this the Plaintiff returned on board the *Holderness*, and served as a sailor on the voyage home, and for his wages in that voyage the present action was commenced; the wages for the outward bound voyage having been paid, as well as the money stipulated for by the indenture.

A rule *Nisi* for entering a nonsuit having been obtained on a former day,

Shepherd Serjt. now shewed cause, and insisted that the act of manumission and the indenture must be considered as parts of one transaction, the manumission being the consideration of the Plaintiff's entering into the indenture; that the Defendant therefore had taken an undue advantage of the Plaintiff's situation, since the latter must be presumed to have been willing to enter into any contract for the sake of obtaining his freedom; that he might have been induced to bind himself to the Defendant for life, and thus only have exchanged one sort of slavery for another, and that the Court therefore must hold an indenture into which the Plaintiff had been driven by such circumstances to be void as obtained from him under a species of duress; and consequently that the Plaintiff was entitled like any other sailor to seek a compensation for his services on board the Defendant's ship as if no indenture existed.

Bayley and *Best* Serjts. were proceeding to argue in support of the rule,

But Lord ALVANLEY Ch. J. stopped them, saying—My brothers being all clearly of opinion that the Plaintiff cannot recover, it is not necessary to hear any further argument. For my own part however I entertain great doubts of the propriety of allowing the defence which has been set up to prevail; because I dread the consequences of giving effect to such a contract as that which was entered into between the Plaintiff and Defendant in the Island of *Grenada*. I trust however that this defence is only to be supported upon the fairness of the contract, apparent upon the face of the transaction; and that the contract would not be considered as valid in *England* if the stipulation had been that the Plaintiff should serve the Defendant for life. The Plaintiff in the present

present case being as free as any one of us while in *England* engaged to serve the Defendant as a seaman, and the Defendant undertook to pay him a stipulated sum: at this time however the Plaintiff concealed that he was a runaway slave. Now I admit that the Defendant was entitled to a full compensation for the breach of the Plaintiff's original contract, he having concealed the circumstance of his being a slave, which circumstance rendered him incapable of fulfilling his engagement. The Defendant is therefore entitled to be repaid the sum of money which he advanced for the manumission of the Plaintiff, in order to enable him to perform the stipulated service on board his ship. But in this case it seems to me that the Plaintiff has taken a further advantage; for we must understand upon this transaction that the old articles for the voyage have been quashed, and that the Plaintiff has been compelled to enter into a new contract, by which he has bound himself, in consideration of being redeemed from slavery and the penal consequences attending his situation, to serve the Defendant for the term of three years. When the Plaintiff was claimed in *Grenada* as a runaway slave, he was not only liable to be remanded to slavery, but by the laws of the island he was amesnable to severe punishment for his desertion. Now if such a contract as this is to be sustained, I tremble at the consequences; for if this be allowed the masters of ships may consider themselves at liberty to purchase the freedom of as many negroes in the *West Indies* as they may think proper, and take engagements from them to serve for life. No doubt the negroes would willingly engage in such contracts. The consequence would be, that a vast number of negroes might be brought over into this country, not indeed strictly as slaves, but as covenant servants, bound to serve for life; this would be little less than an exchange of one species of slavery for another: and though by the law of *England* slavery be prohibited in this country, yet this sort of contract might afford the means of introducing indirectly, what cannot be directly enforced. It appears to me that the only use which the Defendant is entitled to make of the transaction in *Grenada* is to deduct from the wages due to the Plaintiff upon the old contract just so much as he has been obliged to pay to enable the Plaintiff to fulfil that contract.

HEATH J. I confess that this matter strikes me in a very different point of view. When this Plaintiff was claimed in *Grenada* he

1802. WILLIAMS v. BROWN.

he was incapable of performing the service for which he now brings his action. He was also liable to severe punishment for having run away from his master: and he was a slave for life. In that situation the contract in question was entered into, to which the parties were the Plaintiff, the Defendant, and the Plaintiff's old master. I consider the whole as one transaction. The Defendant was to advance the money for the Plaintiff's freedom, in consideration of which the master was to manumit the Plaintiff, and the Plaintiff thus manumitted was to enter into a new contract to serve the Defendant for three years, for which he was to receive certain wages from the Defendant. This was an agreement for the advantage of the Plaintiff: he was to be relieved from punishment; he was to become a free man; and he was to receive a compensation for his service. This agreement he voluntarily entered into. In all countries where slavery is tolerated, agreements between the master and the slave respecting the manumission of the latter are enforced by the law. Suppose the slave after having obtained his manumission should refuse to perform his part of the contract, there is no country where such conduct would be endured. He is competent to enter into a contract for the purpose of his manumission, and therefore such contract may be put in force against him. If indeed any fraud or collusion between the Defendant and the old master had appeared whereby any equity could arise in the Plaintiff's favour, the case might have had a very different complexion: but this case stands clear of all fraud or collusion; and considering the contract as having been beneficial to the Plaintiff, I think that he ought to be bound by his own agreement.

ROOKE J. I agree in opinion with my brother *Heath*. In order to ascertain with whom the justice of this case lies, let us consider who committed the first fault. When the ship was about to sail from *London* the Plaintiff entered into articles which his situation rendered him incapable of performing. And though he might enter into a contract to go to any other place but to *Grenada*, yet he could not engage to go there without danger of being detained. Here then was an agreement entered into without a fair disclosure of circumstances relative to the contract. The consequence was, that on his arrival at *Grenada* a circumstance not disclosed at first was discovered, which prevented the Plaintiff from fulfilling his engagements. Being taken as a runaway

 slave,

ſlave, he became liable to puniſhment, and the forfeiture to his maſter in *Grenada* of all the wages which he had earned during the outward voyage. Unleſs therefore the jury had been of opinion that fraud or dureſs had been employed, I cannot but think the contract entered into in *Grenada* advantageous to the Plaintiff. If indeed the man had been free he might perhaps have made a more advantageous bargain for himſelf. But being a ſlave he could not enter into any contract without the leave of his maſter; and ſo being a ſlave, and liable to the terrible conſequences of deſertion, it is agreed that he ſhall be ſet free, he receives his wages for the outward bound voyage, and on the other hand he engages to ſerve the Defendant for three years at certain wages on board ſuch ſhip, and at ſuch places as the Defendant ſhall have occaſion for his ſervices. Would any jury have pronounced ſuch a contract to be diſadvantageous to the Plaintiff? With reſpect to the enormous extent to which it has been ſuppoſed that contracts of this ſort may be carried, it is ſufficient for us in the preſent inſtance to decide upon the caſe before the Court: and I do not bind myſelf to enforce any other contract unreaſonable in its nature, when it may appear that dureſs has been employed, or undue advantage taken of the ſituation of the parties. In this caſe it appears to me, that the original contract between the Plaintiff and Defendant was put an end to by the agreement entered into at *Grenada*, and that the Plaintiff therefore ought to have been nonſuited.

CHAMBRE J. The queſtion now brought before the Court muſt be decided according to the rights of the litigating parties, without reference to any imaginary conſequences of imaginary caſes. Certainly the Plaintiff is entitled to avail himſelf of any circumſtances of dureſs of which he could take advantage in ordinary caſes: and if he could prove that the agreement was obtained from him by actual force, the agreement would be void. Here indeed at the time of entering into the contract he was in the ſituation of a ſlave. But I do not know that a ſlave is precluded from entering into a contract. He may do ſo provided his contract do not affect the rights of his maſter. Though he cannot deprive his maſter of his ſervices, yet with the conſent of his maſter he may engage to do ſervice for another. No evidence of actual dureſs has been given, but we are deſired to infer it

 from

1802.

WILLIAMS v. BROWN.

from the circumſtances of the caſe. It is ſuppoſed that he has been driven to an unreaſonable and unconſcientious bargain: but I cannot ſay that it ſo appears to me. What was his condition at *Grenada*? Being claimed as a runaway ſlave he was conſidered as a criminal, he was liable to very ſevere puniſhment, he was incapable of recovering for his own benefit the money which he had earned upon the outward bound voyage, and he was unable to fulfil his contract with the Defendant. Then what is there unreaſonable in the terms of this agreement? It is true that by the articles he had contracted with the Defendant for a greater rate of wages; but from that contract he could derive no benefit, for his maſter was entitled to all the wages he might earn. Independent of this circumſtance however, the former agreement was entered into in time of war, whereas the latter was for three years certain, during which time it was probable that the war would ceaſe and the rate of wages be reduced. By reſcinding ſuch a contract as this I think we ſhould be guilty of great inhumanity; for unleſs ſuch a contract can be enforced, no maſter of a ſlave would agree to his manumiſſion, nor any perſon be willing to pay the price of his freedom; the conſequence of which would be that the preſent Plaintiff and all others in ſimilar ſituations muſt remain in perpetual ſlavery. In this caſe an actual manumiſſion took place, the maſter was a party to the agreement, and nothing occurred in the tranſaction to impeach the validity of the contract. This is the deciſion which I think the Court bound by the rules of law to make, and which is moſt conſiſtent with the dictates of humanity.

Rule abſolute.

1802.

(IN THE EXCHEQUER CHAMBER.)

Lucena v. Craufurd and Others; in Error.

The Commissioners appointed by the King under the 35 Geo. 3. c. 80. for the care, sale, and management of such ships and cargoes belonging to subjects of the United States as should be brought into the ports of this kingdom, were held to have an insurable interest in *Dutch* ships on their passage to this country, having been taken by the captain of a *British* man-of-war under instructions from the Admiralty to take all ships and cargoes belonging to the subjects of the United States, and to bring them into the ports of this kingdom to be detained provisionally.

Held also that they might recover for a loss upon such ships by perils of the sea, though the loss did not happen until after a proclamation had issued for general reprisals against the *Dutch*.

Assumpsit on a policy of insurance.

The first count of the declaration (upon which the verdict was taken) stated, that whereas our Sovereign Lord the King by virtue of the powers vested in him by a certain act of Parliament made at a session of Parliament holden at *Westminster* in the thirty-fifth year of his reign, entitled, "An act to make further provision respecting ships and effects coming to this kingdom to take the benefit of his Majesty's orders in council of the 16th and 21st days of *January* 1795, and to provide for the disposal of other ships and effects detained in or brought into the ports of this kingdom" on the 13th day of *June* 1795, to wit, at *London*, &c. did by and with the advice of his Privy Council issue his Royal Commission under the Great Seal of *Great Britain* to *James Craufurd*, *J. B. A. C. J. B.* and *A. B.* directed, whereby our said Lord the King did nominate, constitute, and appoint them Commissioners for the purposes mentioned in the said act, and did authorise and require them to take all such ships and cargoes, goods, wares, merchandizes, and effects, into their possession and under their care as his Majesty could or might by virtue of the said act authorise them to take into their possession and under their care, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they the said *J. C.* &c. should from time to time receive from his said Majesty, his heirs and successors, with the advice of his and their Privy Council, and otherwise in all respects according to the said act; and also to give such directions respecting the proceeds of the sale or sales of any cargoes or parts of cargoes mentioned in the said act to have been ordered to be sold, as the Commissioners to be appointed by virtue of the said act were therein and thereby required and authorised to give respecting the same, thereby also giving and granting to them the said *J. C.* &c. all and singular such powers and authorities, and authorising and empowering them to do, execute, and perform, all and singular such duties and matters and things as his said Majesty could or might give or grant, authorise

or

1802.

LUCENA v. CRAUFURD and Others, in Error.

or require to be done, executed, or performed, by the Commissioners to be appointed by his said Majesty in pursuance and by virtue of the said act. And whereas before the making of the several writings or policies of insurance hereafter mentioned, to wit, on the 10th day of *June* 1795, certain ships called the *Houghley*, *Alblassendam*, *Dordrecht*, *Zeelelie*, *Meermin*, *Agatha*, *Mentor*, and *Surcheance*, with cargoes of goods and merchandises on board the same respectively, being ships, goods, and merchandizes, belonging to subjects and inhabitants of the United Provinces coming from certain parts of *Asia* and *Africa*, and bound to certain parts of the United Provinces, were by his said Majesty's orders seized and taken at sea in their said voyage from *Asia* and *Africa* to the said United Provinces by the Commander of one of his said Majesty's ships of war in company with some ships in the service of the United Company of Merchants of *England* trading to the *East Indies*, in order and to the intent that such ships, goods, and merchandizes, might be brought into the ports of this kingdom; and such ships with such goods and merchandizes on board the same respectively had been carried into *St. Helena* for the purpose of being brought from thence to some port or ports in this kingdom, to wit, at *&c.*; and the said ships, goods, and merchandizes, so having been carried into *St. Helena* aforesaid, and the said *J. C. &c.* so being such Commissioners so appointed and authorised as aforesaid, the said *J. C. &c.* afterwards, to wit, on the 22d of *August* 1795, to wit, at *&c.* according to the usage and custom of merchants, caused to be made and effected a certain writing or policy of assurance, purporting thereby and containing therein that the said *J. C. &c.* by the name, firm, and description of the Honourable the Commissioners for sale of *Dutch* property, the same then and there being their usual style and firm of dealing, as well in their own name, *&c.* did make assurance, *&c.* The declaration proceeded to set out a policy in the usual form on the above mentioned ships, and to state the undertaking of the Plaintiff in error to become an insurer, and his subscription to the policy. It then averred, that notice of the losses and misfortunes which befel the said ships and goods, as hereafter mentioned, arrived in this kingdom before any declaration and valuation was or could be made of the said ships and goods, to wit, at *&c.* That the ships were in good safety at the time mentioned in the policy. It also alleged, that the said ships and

and goods were ships and goods, which, if they had arrived at *London* aforesaid from the said voyage, the said *J. C. &c.* as such Commissioners as aforesaid, were and would upon such arrival have been authorised to take into their possession and under their care, and to manage, sell, and dispose of the same according to the form and effect of the said commission and act of Parliament, and which were intended to be brought from *St. Helena* aforesaid to *London* aforesaid for those purposes in the said writing or policy of assurance mentioned, to wit, at, *&c.*; and that the said *J. C. &c.* as such Commissioners as aforesaid under and by virtue of the said act of Parliament, and the said commission at the time of the sailing of the said ships from *St. Helena* as hereinafter mentioned, and from thence, until, and at the times of the several losses hereinafter mentioned, were interested in the said ships and goods to a large amount, to wit, to the amount of all the money by them ever insured thereon; and that the said insurance so made as aforesaid was so made to and for their use, benefit, and account, as such Commissioners as aforesaid. The declaration further stated, that the ships set sail from *St. Helena* for *England* before the 22d of *August* 1795, *viz.* on the 2d of *July* 1795; and before their arrival, *viz.* on the 1st *September* 1795, four of them were lost by perils of the sea, whereby the assured sustained an average or partial loss to a large amount, to wit, to the amount of 40 *l.* upon every 100 *l.* insured.

To this declaration the Defendants below pleaded the general issue. The cause came on to be tried before Lord *Kenyon* Ch. J. and a special Jury at the *Guildhall* Sittings after *Michaelmas* Term 1799. His Lordship having directed the Jury to find a verdict for the Plaintiffs below upon the first count of the declaration, a bill of exceptions was tendered, from which, when annexed to the record in this Court, the case appeared to be as follows:

The Plaintiffs below gave in evidence a commission under the Great Seal, dated the 19th of *June* 1795, which (after referring to the provisions of the 35 *Geo.* 3. *c.* 80. respecting ships and effects belonging to subjects of the United Provinces detained in or brought in, or to be detained or brought into the ports of this kingdom; and after reciting that several such ships had been or might be thereafter detained in or brought into the ports of this kingdom), appointed the Plaintiffs to take all such ships, cargoes, *&c.* into their possession and under their care, as the Crown was

 empowered

1802.

LUCENA v. CRAUFURD and Others: in Error.

empowered to seize under the said act, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they should from time to time receive from his Majesty, with the advice of his Privy Council, and to dispose of the proceeds, and to do every thing which the Crown could authorise them to do by virtue of the said act. They then gave in evidence certain instructions under the sign manual to the commanders of his Majesty's ships of war and ships carrying letters of marque, dated the 9th of *February* 1795, directing them to bring into the ports of this kingdom all *Dutch* vessels bound to or from any ports in *Holland*, in order that they, together with their cargoes, being *Dutch* property, might be detained provisionally; and that speedy restitution should be made of all cargoes belonging to the subjects of allied or neutral powers. They then proved that the ships mentioned in the policy, before the time when the policy was effected, *viz.* on the 10th of *June* 1795, were *Dutch* ships, and that they with their cargoes, also *Dutch*, were coming from certain parts in *Asia* and *Africa* to certain ports of the United Provinces, and were by virtue of the above instructions seized by Captain *Essington* the commander of the *Sceptre* man of war, in company with some ships in the employment of the *East India* Company, and carried into *St. Helena* for the purpose of being brought into this kingdom. They also proved the Defendant's subscription to the policy; that he had notice of the loss before any valuation could be made; that the policy was effected on account of the Plaintiffs as such Commissioners as aforesaid; that the ships sailed from *St. Helena* on the 2d of *July* 1795, and that they were lost in the manner stated in the declaration, in consequence of which the assured sustained an average loss. The Defendant on his part gave in evidence an order of Council, dated the 13th of *June* 1795, which after reciting, that by the powers vested in the Crown by the before-mentioned act his Majesty had issued his commission to the Plaintiffs authorising them to take the ships and cargoes of *Dutch* subjects, which had been or might thereafter be brought into the ports of this kingdom, into their possession and under their care, and to manage and dispose of them to the best advantage, according to such instructions as they should from time to time receive from his Majesty, with the advice of his Privy Council, directed them forthwith to take into their possession and care all such ships,

ships, &c. according to the lists thereof which they should from time to time receive from the Commissioners of the Customs in *England* and *Scotland*, in pursuance of directions transmitted to them by the Lords of the Treasury; together with other directions not material to this case. He then gave in evidence the King's Proclamation for general reprizals against the ships, goods, and subjects, of the United Provinces, dated the 15th of *September* 1795. He next produced an order of Council, dated the 26th of *November* 1795, which after stating that the four *Dutch East India* ships, *viz.* the *Blassendam*, the *Agatha*, the *Mentor*, and the *Dordrecht*, then lying in the river *Shannon* in the kingdom of *Ireland*, were sent in there by his Majesty's ship *Sceptre*, antecedent to the order for granting general reprizals against the ships of the United Provinces, and that agents had been appointed by *William Essington*, Esq. the commander of the *Sceptre*, and others, concerned in sending in the said vessels, and that the sole interest in all ships so sent in was invested in his Majesty, and the appointment of agents for the care and disposal thereof did of right belong to him, appointed the Plaintiffs to be the agents on behalf of his Majesty for the care and management of the said four *Dutch* ships and their cargoes. The Defendant also proved that the Plaintiffs took possession of the above four ships in the kingdom of *Ireland*. He then gave in evidence certain proceedings in the High Court of Admiralty against each of those ships, and sentences of condemnation, pronouncing each of "the said ships and cargoes to have been taken before the declaration of hostilities against the *Dutch*, and to have then belonged to subjects of the States General of the United Provinces, now the enemies of the Crown of *Great Britain*, and as such or otherwise subject and liable to confiscation." Lastly, he gave in evidence certain instructions from his Majesty to the said High Court of Admiralty, dated the 10th of *October* 1795, which after reciting the before-mentioned act, enabling the King to grant a Commission to three or more persons to take into their possession and manage, &c. all such *Dutch* ships which might be thereafter detained in or brought into the ports of this kingdom, and reciting that such a commission had issued, and that since the issuing of the Commission his Majesty had thought fit to order general reprizals against the ships, &c. of the United Provinces, and to issue a Commission authorising the Lords of the Admiralty to take cognizance of all captures, &c. directed the said High

1802.

LUCENA v. CRAUFURD and Others; in Error.

Court of Admiralty to proceed to the adjudication of such ships, &c. of which possession had been taken or should be taken by the said Commissioners, as should be proceeded against by the King's Advocate General, in order that the same might be condemned to the Crown as good and lawful prize, reserving nevertheless to the said Commissioners the sale, care, and management thereof, as well before as after final adjudication according to the provisions of the said act."

Upon this evidence the counsel for the Defendant insisted that the Plaintiffs could not maintain their issue, because the said ships mentioned in the policy of insurance in the first count of the declaration were not ships, which, if they had arrived at *London* from the said voyage therein mentioned, the said Plaintiffs, as such Commissioners, would have been authorised to take into their possession, and under their care, according to the effect of their Commission, and the act of Parliament mentioned in the first count of the declaration, and because upon the evidence produced it appeared that the Plaintiffs as such Commissioners under the said act and Commission were not at the time of the sailing of the said ships from *St. Helena*, as in the first count of the declaration mentioned, and from thence, until, and at the time of the several losses therein also mentioned, interested in the said ships or goods, or either of them, to any amount or in any manner whatsoever, so that a legal and valid assurance could be effected by the Plaintiffs as such Commissioners on their own account; and that the insurance so made, as in the first count of the declaration mentioned, was not made to and for the benefit and on the account of the Plaintiffs as such Commissioners according to their allegation. Lord *Kenyon* however directed the Jury that in point of law the Plaintiffs had maintained their issue, and the jury accordingly found a verdict for the Plaintiffs on the first count of the declaration.

The assignment of errors was conformable to the objections taken at the trial.

This case was argued three times, first in *Michaelmas* Term 1800 by *Giles* for the Plaintiffs in error, and *Wood* for the Defendants in error; secondly in *Hilary* Term 1801 by *Law* for the former, and *Gibbs* for the latter: after these two arguments Lord *Eldon*, before whom as Chief Justice of the Common Pleas the case was debated, having been made Lord Chancellor, and Lord

7 *Alvanley*

Alvanley having succeeded him as Chief Justice of the Common Pleas, a further argument was desired by the Court; and accordingly in *Michaelmas* Term 1801 the case was argued by *Erskine* for the Plaintiffs in error, and *Park* for the Defendants in error.

Arguments for the Plaintiffs in error.—The first count of the declaration upon which the verdict has been taken contains two material averments, the first, that the ships and goods insured were ships and goods, which, if they had arrived at *London*, the Commissioners would have been authorised to take into their possession, and to manage, sell, or otherwise dispose of, according to the form and effect of their Commission, and of the act of Parliament; the second, that the Commissioners under and by virtue of their Commission, and of the act of Parliament at the time of the sailing and loss were interested in the ships and goods insured. Both these averments are negatived by the evidence. Under the act which authorised the King to grant a Commission, and under the Commission connected with the instructions, the Commissioners had only authority to take into their possession such ships and goods as had belonged to the subjects of the United Provinces, and were brought into the ports of this kingdom to be detained provisionally. By orders of Council of the 16th and 21st of *January* 1795, confirmed by the 35 *Geo.* 3. *c.* 15. the King authorised the subjects of the United Provinces to land their goods in the ports of this kingdom in vessels of any country, and navigated in any manner without being liable to seizure, and directed that they should be warehoused under certain regulations. On the 9th of *February* he was pleased to direct the commanders of his ships of war and privateers to bring in by force all *Dutch* vessels bound to the ports of *Holland*, in order that they and their cargoes, being *Dutch* property, might be detained provisionally. On the 22d of *May* following the 35 *Geo.* 3. *c.* 80. passed, which after reciting the 35 *Geo.* 3. *c.* 15. authorised the proprietors of ships and goods who had voluntarily taken the benefit of that act to dispose of those ships and goods under certain regulations contained in the first twenty sections. The twenty-first section then after reciting that other ships and cargoes had been or might be thereafter detained or brought into the ports of this kingdom, and that such ships and goods might perish unless some provision were made for them, authorised his Majesty to grant a commission, enabling three

1802.

LUCENA v. CRAUFURD and Others; in Error.

or more persons to take such ships and cargoes into their possession, &c. Now the ships and goods to which this recital refers were to be brought in under the order of the 9th *February* for the purpose of being detained provisionally, and the Commissioners had no authority to take possession of any but such ships and cargoes. The ships insured were indeed taken on the 10th of *June* under the instructions of the 9th of *February* preceding, and carried into *St. Helena*, from which they sailed on the 2d of *July* 1795; but on the 15th of *September* 1795 a proclamation issued for making reprisals upon the property of the subjects of the United Provinces. Before the date of this proclamation therefore the goods were vested in the subjects of the United Provinces, who had an insurable interest in them, and after that date they became prize, and vested in the King *jure coronæ*, who acquired by the proclamation an inchoate right under the law of nations, subject only to the adjudication of the Court of Admiralty; and Captain *Essington* no longer held the ships for the purpose of being brought into the ports of this kingdom to be detained provisionally, but as the property of the Crown. With respect to the ships which actually did arrive, and of which the Commissioners took possession, they did not take possession of them by virtue of the act of Parliament, but under an authority from the Crown of the 26th of *November* 1795, appointing them prize agents. The Court of *King's Bench* has afforded an express authority upon this point. For in a late case where Lord *Keith* had taken certain ships belonging to the subjects of the United Provinces at the Cape of *Good Hope* before the Proclamation for reprisals, and having brought them into this country after that Proclamation proceeded against them in the Court of Admiralty as prize, the Commissioners applied for a prohibition, urging that they were entitled to the sole management and disposal of the ships, but the prohibition was refused. The Commissioners indeed by their own act have shewn, that they did not consider the ships which arrived as coming under their control as Commissioners appointed by the act: for they took possession of them in *Ireland*, which they could not have done under their Commission, but only under their authority as prize agents. The second averment is that the Commissioners under and by virtue of their Commission and the act of Parliament at the time of the sailing and loss were interested in the ships and goods. It appears however upon the evidence that they had no insurable

insurable interest in them. They had merely a contingent expectation of managing and controlling them in case they should be brought into the ports of this kingdom, an event which at the time when the policy was effected had not happened, might not happen, and in fact ultimately never did happen. Now what is the nature of a policy of insurance? It is an instrument by which a party "causes himself to be insured" that is indemnified against any injury happening to certain subjects stated in the policy: but in order to be indemnified the assured must have the thing which he insures against peril. To constitute an insurable interest therefore there must be a present right of property in the subject matter, capable of being transferred by the ordinary means of transfer, and capable of being vindicated in point of right by the ordinary remedies of the law. The uniform course of the precedents upon policies of insurance has been to aver an interest in so many words, or to state those circumstances from whence a conclusion of interest must necessarily arise. The oldest entry of the kind is in precedents in the Upper Bench, page 77. where the declaration contains several allegations introduced for the sole purpose of shewing the plaintiff's property in the goods. In *Goram v. Sweeting*, 2 *Saund.* 200. 205. though the insurance was from *London* to *Gibraltar*, "without further account to be rendered for the same," yet the declaration alleges an abandonment, which shews that it was thought necessary that the insurer should have an interest capable of abandonment; and in the case *Gallop v. Proudfoot*, *Vidian* 48. the plaintiff expresly averred, that at the time of the insurance he was possessed of a part of the ship; though he declared upon a valued policy "without further account." Indeed in the case of *Martin v. Sitwell*, 1 *Show*. 156. which was previous to the statute 19 *Geo*. 2. respecting wager policies, the plaintiff who had made an insurance was allowed to recover back the premium, because no goods had been put on board; which he could not have been allowed to do if the policy would have been equally good whether the plaintiff had any interest on board or not. That a mere wager is legal there can be no doubt, but insurance is a different thing from a wager. It is a contract respecting the indemnity of property against certain accidents which may befall it to the detriment of the persons interested in it. And it was so considered by Lord Chief Justice *Willes* in the case of *Pole v. Fitzgerald*, *Willes' Rep.* 645. who cites the authority of *Roccus* and

1802.

LUCENA v. CRAUFURD and Others; in Error.

1802.
LUCENA
v.
CRAUFURD
and Others;
in Error.

Cleirac to that effect. Consistently therefore with this notion it is that all the precedents, printed and manuscript, previous to the statute 19 *Geo.* 2. with one single exception either aver an interest, or contain a dispensation of the proof of interest. The single exception is contained in *Clift's Entr.* 77. *Grotton* v. *Aldworth*; but that case does not appear to have come into discussion, and was probably a mere precedent inaccurately drawn. Indeed before the statute the Courts were extremely jealous of policies interest or no interest, sometimes compelling the parties to abandon what interest they actually had, and sometimes upon bills filed for that purpose, ordering them to be delivered up to be cancelled; as in *Goddard* v. *Garret*, 2 *Vern.* 269. And in *Le Pypre* v. *Farr*, 2 *Vern.* 716. the assured was ordered to discover what goods he put on board, though he had offered to abandon, in order that it might be referred to the master to examine the value of the goods saved and deduct it out of the sum insured. The touchstone therefore of insurances, not made in the form of a wager, is that there be something which may be abandoned; thus Lord *Mansfield* says that it is the criterion of wagering policies that you cannot abandon; and though in valued policies if there be something to abandon, a larger interest than really exists may be insured, yet such policies have only been allowed for the accommodation of traders who might be ignorant what sort of cargoes their factors might have to remit. Thus stood the law of insurance up to the 19 *Geo.* 2. *c.* 37. the object of which was to prevent the contract of insurance being made use of as the means of wagering and to place it from that time on the same footing on which it originally stood at common law. The statute, after reciting that many pernicious practices had ensued from wager policies, strictly prohibits any such to be made "interest or no interest," or "without further proof of interest than the policy," which are specifications of the terms usually inserted in such policies: but the words which follow apply not only to the mode in which the evasion might be attempted, but to the very thing itself, "or by way of gaming or wagering or without benefit of salvage to the insurer." With the exception of *Le Cras* v. *Hughes*, *Park Insur.* 269. *Gregory* v. *Christie*, *Park Insur.* 11. and *Flint* v. *Le Mesurier*, *Park Insur.* 268. *in notis*, all the cases subsequent to the 19 *Geo.* 2. are reconcileable with the principles of insurance contended for by the Plaintiffs in error. In *Le Cras* v. *Hughes* Lord *Mansfield* relied upon the authority of a case of

8 *Grant*

1802.
LUCENA v. CRAUFURD and Others, in Error.

Grant v. *Parkinson* (a) which had been previously determined, but which case if accurately examined will be found to bear no analogy to it. There the insurance was "on 1,000*l.* being profits expected to arise from the cargo of the ship *Providence* in the event of her safe arrival at *Quebec*," and there was an allegation in the declaration that the Plaintiff "until and at the time of the misfortune hereinafter mentioned was interested in the profits expected to arise from the said goods, wares, and merchandizes to a large value," *&c.* Now the fact was, as indeed might be inferred from this allegation, that the assured was the owner of the goods on board, and consequently was interested in the profits to arise therefrom. Those goods he had insured by a separate policy; and therefore by making a distinct policy on the profits he had only secured those profits to himself by this second policy which he might have secured by the first had it been a valued policy upon the goods and profits to arise therefrom. Lord *Mansfield* begins his judgment by observing, "This was a cargo of molasses belonging to the plaintiff." The substratum and foundation of the insurance therefore was not a bare expectation of interest in a subject with which at the time of affecting the insurance the insured was not connected, but an expectation of profits on goods at that time his, and insurable together with the profits in a valued policy. Independent of these observations however *Le Cras* v. *Hughes*, whether properly decided or not is very distinguishable from the present case. There Lord *Mansfield* considered the main question to be, whether that possession which the joint captors had obtained of the prize was, when considered with reference to the prize act and proclamation, such a possession as vested in the captors an insurable interest; the distinction between that case and the present therefore is very essential, in the former the insurable interest being supposing to arise out of the actual possession, whereas in the present case the insurable interest is supposed to arise out of the expectation of possession. With respect to the observation supposed to have been made by Lord *Mansfield* that an agent of prizes not having the possession of the property may insure, it seems to be inconsistent with the rest of his judgment, which distinctly proceeds upon the ground of the assured having the possession as well as the expectation of the property. It may be added that Lord *Mansfield*

(a) This case was cited from Mr. *Dunning*'s brief in the cause and a manuscript note of the judgment.

1802.

LUCENA v. CRAUFURD and Others; in Error.

in a great meaſure relied upon an idea that the prize act and proclamation veſted the property of a joint capture in the joint captors, which appears to have been a miſtake; and accordingly it has been found neceſſary to introduce a clauſe in the late prize acts 33 *Geo.* 3. *c.* 66. *ſ.* 3. 37 *Geo.* 3. *c.* 109. *ſ.* 3. for the expreſs purpoſe of veſting in the captors the property of a joint capture by the army and navy. With reſpect to *Gregory* v. *Chriſtie* it is difficult to diſcover upon what ground the expenditure of money for the uſe of a ſhip in any way whatever, can be inſured as an intereſt in goods, ſpecie, and effects. In the caſe of *Flint* v. *Le Meſurier* Lord *Kenyon* is ſuppoſed to have expreſſed an opinion that the commiſſions of a conſignee might be inſured, but it appears that the matter was compromiſed, and the caſe did not come to any deciſion. It is therefore to be conſidered as nothing more than a note of an *obiter dictum* much too looſe to form the ground of any deciſion. The next claſs of caſes to be conſidered relates to inſurance upon freight. It may be contended that as all intereſt in freight is a mere expectation, no one being entitled to it until the arrival of the goods, it does not fall within the deſcription of intereſt which the plaintiffs in error contend to be neceſſary. It is obſervable however that this expectation is founded upon an abſolute contract entered into between the ſhip owner and the merchant; and is therefore an expectation which is not to be defeated by any other contingencies than thoſe very perils againſt which he inſures: for even this expectation built upon an abſolute contract will not raiſe an inſurable intereſt unleſs the goods be actually put on board. The two caſes of *Tonge* v. *Watts*, 2 *Str.* 1251. and *Montgomery* v. *Egginton*, 3 *Term Rep.* 362. clearly eſtabliſh this principle: in the former of theſe though the goods were lying upon the ſhore ready to be ſhipped, and the policy on freight had been previouſly effected, yet as the ſhip was deſtroyed before the goods were put on board, it was held that though the aſſured had certainly loſt his freight yet there was no inception of intereſt in the freight, but a mere expectation; and in the latter where part of the goods were actually put on board the inſured was allowed to recover. The ſame principle prevailed in *Thompſon* v. *Taylor*, 6 *Term Rep.* 478. for though no goods had actually been put on board yet as the ſhip had broken ground and ſet ſail for the place where they were to be taken in there was an inception of the contract for freight. The intereſt and the riſk muſt be coeval. The remote and viſionary intereſt which was the ſubject of

of the present insurance may be compared to that which was brought forward in a case of *The Attorney General* v. *Smith* before Lord *Thurlow* Ch. J. by the next of kin of a lunatic in order to have a bill to perpetuate the testimony of witnesses, and thereby secure his succession to the lunatic's estate: which application was refused on the ground of want of interest. And Lord *Thurlow* said, " The present is a suit for something by somebody who may have, if God pleases, an interest against one who may have, if God pleases, also an interest." Perhaps some reliance may be placed upon the rule respecting life-insurances that a creditor has such an interest in the life of his debtor that he may insure it. *Anderson* v. *Edie*, *Park Insur*. 432. But there the security derived from the person of the creditor is the subject insured, and indeed the governing principle of all the cases upon that subject will be found to be consistent with the rule contended for by the Plaintiff in error, because they proceed on the ground that no insurance is good which is not made to insure something of which the party insuring is in the actual enjoyment, and which depends upon the duration of life.

Arguments for the Defendants in error. The *Dutch* Commissioners were appointed to sell, manage, and dispose of effects which should be brought into, or which should hereafter come into the ports of this kingdom. But it is insisted that the words " to be detained provisionally" contained in the instructions to to the commanders of the King's ships, connected with the alteration which took place in the state of things previous to the time at which the ships insured would have arrived in the ports of this kingdom, if not lost, materially change the character of the Commissioners with respect to the subject insured. It must be remembered however that the policy was dated on the 22d of *August* 1795, and that the proclamation for reprizals did not issue until the 15th of *September* following; at the date of the policy therefore the authority and interest of the Commissioners was precisely the same as when it first vested in them. Had no proclamation for reprizals issued the situation of the Commissioners would clearly have remained unaltered. Now the order of Council of the 10th *October* empowering the Court of Admiralty to condemn as prize all such *Dutch* ships as should be brought in, most cautiously preserves the old authority of the Commissioners, and referring to the act under which that authority was derived, says, " reserving

1802.
Lucena v. Craufurd and Others; in Error.

" reserving nevertheless to the said Commissioners the sale, care, and management thereof, as well before as after final adjudication according to the provisions of the said act." It is remarkable that in this order of council there is a reference to the Commission, but that the names of the Commissioners are never mentioned, and that the sale, management, &c. is reserved to them, " according to the provisions of the said act." Though upon a Proclamation for reprizals the right to all enemies' property seized vests in the Crown *jure coronæ*, still that right is but an inchoate right, and is not complete till condemnation in the Admiralty. Now upon the face of those very instructions by which the Admiralty was authorised to condemn, and thereby would have completed the right of the Crown if nothing had been added, the Crown itself restrains the condemnation to the purposes of the Commission previously issued, and prevents that right vesting in the Crown, which if not so restrained might perhaps have been inconsistent with the whole authority of the Commissioners. It is true that the original Commission was in its nature revocable, but it is equally true that it was in its terms unlimited, and still remains unrevoked. And though in the order of Council of the 26th of *November* his Majesty constitutes the Commissioners Prize Agents for the four ships which had gone into the ports of *Ireland*, that provision was only made to prevent disputes respecting the disposition of that which might seem not to come within the terms of the original Commission which extended only to the realm of *Great Britain*, and it is in that instance only that they are treated as prize agents; for in the orders to the Admiralty authorising condemnation, the term " prize agents" is never used, but they are considered as Commissioners acting under an old authority. Whether the King or the subjects of *Holland* were *cestuy que trusts* of the property, this at least must be allowed that the *Dutch* under all the circumstances of the case retained their original character of statutable consignees. With respect to the main question raised upon this record, whether the *Dutch* Commissioners had an insurable interest? there is no pretence for saying that this was a wagering policy. The Commissioners stated to the underwriters the nature of their interest and of the property to be insured, and they only seek to recover the amount of loss sustained upon that property. Without hazarding a definition of insurable interest, it may be stated as a principle that when nothing

thing ſtands between the inſured and the poſſeſſion of the property to be inſured, but the perils inſured againſt, he is in a ſituation which entitles him to make the inſurance. It is true that a contract of inſurance is a contract of indemnity, and it is not lawful to make uſe of that contract for the purpoſe of gaming or wagering; but it never has been held neceſſary that the inſured ſhould have a veſted intereſt in the property; and the true queſtion is whether he be intereſted in ſecuring the property from the perils againſt which he inſures. In this caſe had the ſhips not been loſt by perils of the ſea they would have arrived in the ports of this kingdom, and the Commiſſioners would have taken poſſeſſion of them. Suppoſe two ſhips at *St. Helena* of equal value bound for *England*, in one of which a perſon has the abſolute property, and the other is aſſigned to him on condition of her ſafe arrival in the ports of this kingdom. The loſs of either of theſe veſſels by perils of the ſea will equally affect the perſon expecting them, though his title to one would not accrue until her arrival. Would an inſurance upon the latter veſſel be gaming or wagering, or could it be contended upon any principle of reaſon, juſtice, or law, that ſuch an inſurance would not be good? Admitting for the ſake of argument that it was neceſſary before 19 *Geo.* 2. to prove an intereſt unleſs the policy contained a ſtipulation diſpenſing with that proof, the only effect of the ſtatute has been to prohibit the introduction of ſtipulations of that ſort, leaving the queſtion reſpecting the nature of inſurable intereſt upon the ſame footing as before the ſtatute.* The caſe of *Tonge* v. *Watts*, though much relied upon by the other ſide, is perfectly conſiſtent with the principles now contended for; the inſurance there was upon freight, and as the goods had never been put on board, the freight had no inception, the ſubject matter of the inſurance had no exiſtence in point of fact, and the riſk therefore never commenced. Here the argument might be concluded, it never having been decided that a veſted intereſt in the ſubject matter of inſurance is neceſſary; but many caſes have come under diſcuſſion in which it has been expreſsly holden that leſs than a veſted intereſt may be inſured. In the caſe of *Grant* v. *Parkinſon* two policies (*a*) were effected, and that upon which the queſtion aroſe was "upon the profits of a cargo of molaſſes." It is impoſſible therefore to

(*a*) Both policies were produced.

1802.

Lucena v. Craufurd and Others; in Error.

contend that the insurance was upon any thing but profits *eo nomine*. Mr. *Wallace* and Mr. *Dunning* were counsel for the defendant in that case, and they were either convinced that no objection arose from the nature of the interest insured, or if any objection was taken upon that point, it was overruled. That case has now been decided twenty years, and not only has never been overruled, but has since been constantly recognised as law. According to a manuscript note of *Le Cras* v. *Hughes* it appears that Lord *Mansfield* in his judgment referred to *Grant v. Parkinson* as having decided the question of insurance upon profits. Mr. Justice *Lawrence* in *Thomson v. Taylor* again recognised it as having decided the same point; and Lord *Kenyon* in a case of *Barclay* v. *Cousins*, which was an insurance upon profits, and is still depending in the *King's Bench*, said, "in the 22d of *Geo.* 3. a case of *Grant* v. *Parkinson* not to be distinguished from this was decided by Lord *Mansfield*, who having some doubts desired to have the further consideration of the Court; and though that case was argued by Mr. *Wallace* and Mr. *Dunning*, they did not prevail; but the Court, constituted as it then was, were clearly of opinion that it was an insurable interest." From the manuscript note of *Le Cras* v. *Hughes* above referred to, the words of Lord *Mansfield* upon this part of the subject appear to have been particularly strong. He says, "whenever a question has been made since the time of Queen *Anne* the King has always given it (the prize) to the captors. Is the contingency then of the ship coming safe such an interest as the captors may insure? Some interest is necessary, but not any particular form of interest. The question is this, whether this contingency is such a benefit to me as will make it a loss to me if the ship does not arrive? An insurance upon the profits of a voyage was holden the other day to be good. An agent may insure the arrival of a ship which will produce him profit. Here the possession gives the interest in the arrival; yet the vessel may bring material papers to shew that the ship is neutral. It is not a vested interest, but such an expectation as never yet was defeated." Though Lord *Mansfield* may have been mistaken in supposing that the expectation of a grant from the Crown had never been defeated, yet proceeding upon that supposition his reasoning is equally applicable as an authority in this case. The cases of *Kent* v. *Bird*, *Cowp.* 583. and *Lowry* v. *Bourdieu*, *Doug.* 468. clearly shew the opinion of Lord *Mansfield*, that the only

object

object of the statute of 19 *Geo.* 2. was to prevent gaming and wagering by policies of insurance: but he never intimates the necessity of the insured having a vested interest in the property. So Lord *Kenyon* in *Montgomery* v. *Eggington* stated the whole question to be "whether it was a colourable insurance and a gaming policy, or whether it was a *bonâ fide* transaction?" In *Boehm* v. *Bell*, 8 *Term. Rep.* 154. which was an insurance made by the captors of ships seized as prize, Mr. Justice *Grose* says, "It seems to me that the whole difficulty has arisen from confounding an absolute indefeasible interest with an insurable interest. It is not pretended that the assured had the absolute property in the subject of insurance; neither need they have such property to make the policy legal; it is sufficient if they had an insurable interest." And according to what was said by Lord *Mansfield* in the case of *Le Cras* v. *Hughes* "they certainly had an insurable interest." Mr. Justice *Lawrence* in the same case says, it may be asked in the language of Lord *Mansfield* in *Le Cras* v. *Hughes*, "had not the insured such an interest in the ship coming home as to entitle them to an indemnity?" Mr. Justice *Buller* in the case of *Wolff* v. *Horncastle*, *ante*, vol. 1. p. 323. laid it down as clear that a creditor who is to have a lien upon a cargo when it arrives may insure; and Mr. Justice *Heath* in the same case held, that a contingent and reasonable expectation of interest was sufficient to entitle a party to insure. Again in *Curling* v. *Long*, *ante*, vol. 1. p. 636. Lord Ch. J. *Eyre* said, "if goods be so situated as to create a well grounded expectation of freight being raised, it is decided that the freight is insurable." And in *Page* v. *Fry*, *ante*, vol. 2. p. 243. Mr. Justice *Chambre* said "the spirit of the 19 *Geo.* 2. only requires, that the policy shall not be a gaming policy;" and he therefore held that an interest in an hundredth part of the cargo was sufficient. It has been contended that because in addition to the prohibition enacted by the 19 *Geo* 2. against policies in a particular form, the clause goes on to say, "or without benefit of salvage," that therefore no interest can be held insurable where in the event of a loss there will be no benefit of salvage to the underwriter; but the true meaning of those words is, that wherever the subject matter of insurance affords to the underwriter the benefit of salvage, that benefit shall not be excluded by the contract of the parties. It is supposed that nothing can be the subject matter of insurance which cannot be abandoned; but where the interest

arises

1801.

Lucena v. Craufurd and Others; in Error.

arises upon a lien or upon money lent on bottomry or *respondentia*, the insured has nothing to abandon, and yet there can be no doubt that these are good insurable interests. Nor could the insured in the case of *Thompson* v. *Taylor* have abandoned any thing, the assured having had nothing but a right of action against the consignees in case the ship arrived at the place for which she was chartered. In *Emerigon*, 1 vol. p. 232. it is said to be lawful in *Italy* to insure profits, but that the ordinances of *Louis* the fourteenth prohibit owners and masters from insuring freight, merchants from insuring expected profits, and seamen from insuring wages; which shews that without that express prohibition profits would have been insurable, and indeed that such an insurance stood on the same footing with an insurance on the two subjects to which the ordinance refers at the same time. Another argument may be drawn from the practice of insurance upon lives, which is commonly resorted to by creditors, in order to secure themselves against the death of their debtors, "by which their security would in some degree be lessened." In *Postlethwaite*'s Dictionary, vol. 1. p. 150. it is stated as one of the objects of the first Life Insurance Company, that persons wanting to borrow money might by insuring the lives be able to give a security for the money borrowed. The 14 *Geo.* 3. *c.* 48. prohibits any person from insuring the life of another in which he has no interest; but many cases have occurred since that statute where creditors have insured the lives of their debtors; and in *Anderson* v. *Edie* it was expressly decided that they might do so, Lord *Kenyon* saying, "that a creditor had certainly an interest in the life of his debtor, the means by which he was to be satisfied might materially depend upon it, and at all events the death must in all cases in some degree lessen the security". The case of *Dwyer* v. *Edie*, *Park.* 432. was also an insurance by a creditor; as was *Stackpole* v. *Simon*, *Park.* 437. and *Willis* v. *Poole*, *Park* 439. In the former of which two cases Lord *Mansfield* says, "as to the interest this policy may be considered as a collateral security for a debt due to the Plaintiff;" and in the latter a question was intended to have been made as to the Plaintiff's interest, but was disposed of by the Plaintiff's having proved a judgment debt.

The course of argument pursued by those learned Judges who thought the judgment of the Court of *King's Bench* ought to be affirmed, was as follows.

1802.

LUCENA v. CRAUFURD and Others in Error.

Upon this writ of error two exceptions are ſtated to the direction given by the noble Lord at *Niſi Prius*; the firſt is that the ſhips and veſſels inſured were not ſuch ſhips and veſſels as if they had arrived, the Commiſſioners would have been authoriſed to take into their poſſeſſion and under their care and management by virtue of their commiſſion and the act of Parliament; the ſecond objection is that at the time of the ſailing of the ſaid ſhips and from thence until and at the time of the ſeveral loſſes the Commiſſioners were not intereſted in the ſaid ſhips and goods or either of them, to any amount or in any manner whatſoever. In order to underſtand theſe queſtions it will be abſolutely neceſſary to advert to the circumſtances which led to the appointment of theſe Commiſſioners and the nature of the property which was put under their care. The ſtate of *Holland* being ſuch as to render it neceſſary for his Majeſty to open the ports of this kingdom for the reception of thoſe perſons with their property who might find it neceſſary to take refuge from the calamities under which that country laboured, and it being at the ſame time doubtful whether we ſhould be under the neceſſity of commencing hoſtilities with our former allies, orders were iſſued in *January* 1795 to receive all ſuch property as ſhould be voluntarily ſubmitted to our protection, to be taken care of and detained proviſionally. On the 9th of *February* it was found neceſſary to proceed a ſtep further, and orders were accordingly iſſued to the officers and commanders of ſhips to take into their poſſeſſion by force all *Dutch* ſhips bound to or from the ports of *Holland*, for the purpoſe of being brought into this country and detained proviſionally. From that moment it became his Majeſty to do every thing for the owners, which if he had not taken their property into his cuſtody, they might have done for themſelves; to take care that theſe ſhips and goods might be forthcoming for the benefit of their owners, in caſe it ſhould be deemed expedient to reſtore them, or for his own ſubjects or himſelf in caſe hoſtilities between this country and *Holland* ſhould enſue. For this purpoſe the act of 35 *Geo.* 3. *c.* 80. was paſſed, authoriſing his Majeſty to grant that commiſſion which afterwards iſſued on the 13th of *June*. At this time it was manifeſt that ſhips and goods might be taken, the owners of which could not be known, and the object of the act ſeems to have been to ſubſtitute the Commiſſioners under the direction of the King and Council as conſignees of ſuch unknown owners,

1802.

LUCENA v. CRAUFURD and Others, in Error.

owners for the purpose of securing these ships and cargoes. In this state of things if any ships had been brought in the Commissioners would have been entitled to take possession of them under their commission, and that right continued until the time of the several losses, the commission never having been revoked, but on the contrary studiously kept in force for the purpose of enabling the Commissioners to have the possession, care, and management of the ships and cargoes. It is said however that the declaration of hostilities put an end to the commission; but that is not so; the object of the commission was to enable the Commissioners to take into their custody all such *Dutch* ships as should arrive in this kingdom to whomsoever they might ultimately belong. The declaration of hostilities might indeed have made them trustees for his Majesty, and he might if he had thought fit have revoked the commission, but not having done so they remained his trustees; and the object of their trust became definite, whereas before it was indefinite. But it is contended that by a subsequent order, the commission was revoked by his Majesty. Some of the ships having been taken to *Ireland* from necessity it was thought expedient that an adjudication of prize should be obtained, and for this purpose his Majesty constituted these persons his Commissioners to claim in the Court of Admiralty. But did this annihilate the first commission? No; so far from it that the order of the 10th of *October* expresly reserves "to the said Commissioners the care, sale, and management thereof (the ships and cargoes) as well before as after final adjudication, according to the provisions of the said act:" thereby recognizing and confirming the said commission as a subsisting authority. If therefore these ships and cargoes had arrived in this country they would have come into the possession and under the care and management of the Commissioners. The second objection is the most material. It will not however be necessary to enter into a discussion of the cases which have been cited at the Bar. It may be admitted that a mere hope or expectation cannot be insured, and it may therefore also be admitted that the next of kin to a person in a dying state and incapable of making a will, who has property on the sea, cannot insure that property. This case was put and much relied upon in the argument; but it is not at all analogous to the present. It would be an insurance not merely against the perils of the sea, but against the possibility of the recovery of the dying

man,

man, of the arrival of the ship before his death, of the dying man surviving the party insuring, and of his making a will. Any of which contingencies taking place would prevent any interest accruing to the next of kin. It would be impossible for a court to weigh the degree of probability or reasonable expectation which would constitute an insurable interest. A rule has been laid down by the Counsel for the *Dutch* Commissioners to which no exception has yet been suggested, *viz.* that where nothing intervenes between the subject insured and the possession of it, but the perils insured against, the person so situated may insure the arrival of such subject of insurance, for he has an interest to avert the perils insured against. On the other hand it was contended for the underwriters that nothing could be insured which was not capable of abandonment. But abandonment affords no criterion of an insurable interest, for neither in bottomry or *respondentia* can there be any abandonment, nor could there have been any abandonment of the freight in *Thompson* v. *Taylor*. It is not so clear however that the interest insured in this case might not have been abandoned, for if the Commissioners are to be considered as trustees they might have abandoned with the consent or for the benefit of the *cestuy que trusts*, whoever they may be, in the same manner as other trustees. Let us consider the nature of the interest which the Commissioners took under the commission and act of Parliament. It has been contended from the words of the act of Parliament that the Commissioners could have no connection whatever with the ships and cargoes until after their arrival in a *British* port; but the words of the act do not necessarily require that construction. The act appoints them Commissioners for the management of all *Dutch* ships "which have been or may be hereafter detained in or brought into the ports of this kingdom;" that is, *reddendo singula singulis*, which may be detained in or may be brought into the ports of this kingdom. Now the words "may be brought in," do not so necessarily exclude the idea of a vested interest in the Commissioners until brought in, as if the Legislature had used the words "shall have been brought in." Independent however of these observations, it is not necessary that an insurer should have a beneficial interest in the property insured; it is sufficient if he be cloathed with the character of a trustee, an agent or a consignee; and if these Commissioners can be considered in either of these capacities, they have an insurable interest. According to the terms of the statute it seems as if they

1802. Lucena v. Craufurd and Others; in Error.

may be considered in either of these capacities. They may be considered as trustees for the Crown, or for the persons who shall be ultimately entitled to the property; as general agents for the purpose of disposing of the property on its arrival in *England*, or as statutable consignees. It is not necessary that the particular *cestuy que trusts* should be ascertained at the moment of the insurance. Considering the true spirit of the act, and the objects which it had in view, it was not possible more specifically to point out their *cestuy que trusts* than has been done; but granting the Commissioners to be merely trustees for persons unknown, and for objects not precisely ascertained at the time when the insurance was effected, yet if they were trustees to any purpose, they acquired from that character sufficient interest in the trust property to insure. Trustees under the Court of Chancery, trustees for lunatics, trustees for infants, trustees for all who cannot act for themselves certainly may insure. And do not these Commissioners fill a character analogous to theirs, when the property is vested in them for purposes, which however events may turn out, cannot but be beneficial to some persons or other, who at the time are obviously incapable of acting for themselves; nay it might not perhaps be too much to say, that representing the character and invested with the authority and interest of such consignees, agents, or trustees, they were not only at liberty but were called upon to insure the property. It became their bounden duty so to do. What was the main purpose and object of the act? It was to authorise and empower certain persons to manage, sell, and dispose of the property "to the best advantage;" lodging the whole care, superintendance and conduct of it in them, and giving them such powers as might be necessary for effectuating those objects. Nobody can doubt that they would have been justified in taking a warehouse to be ready to receive the goods on their arrival. From the moment the Commission issued, they acquired a right of doing every thing which was necessary for the protection of the property so vested in them as trustees. Then was it not necessary for the protection of the property that some persons should be authorised to insure? Would they not otherwise have been invested by Parliament with an imperfect and crippled authority; and is it not to be presumed that when the Legislature delegated to them every necessary power for the best administration of the property, it meant also to delegate to them what is of more importance the

power

power of protecting and securing the property itself? Clearly the Crown had an insurable interest from the moment these ships were seized, and if so the *Dutch* Commissioners standing in the situation of trustees of the Crown must have been invested with the same interest. When the property was taken out of the possession of the *Dutch* owners, it was scarcely possible for them to effect an insurance, or indeed to ascertain whether it might be worth while to attempt to insure property which his *Britannic* Majesty had taken into his own custody under circumstances which rendered their interest extremely precarious. To prove that the Commissioners had no interest in the subject of insurance at the time of the loss, it was said that they could exercise no act of ownership over the ships or goods while at sea; that they could bring no action to recover them if detained, or to vindicate any injury done to them; that the perils of the sea intervened before the commencement of their interest, and that they had no right to grasp the property before its arrival. Yet in this respect they resembled many other persons whose interest is contingent. The owner of a ship acquires no right to freight until the arrival of the ship; for though the interest commences as soon as the goods are put on board, yet by the express words of the charterparty the freight is contingent until the arrival. Suppose a special consignment to be made to *A* in case he should be living or resident at *London* upon the arrival of the ship, he could bring no action in respect of the ship or goods until their arrival, and yet it can scarcely be doubted that he might insure. Suppose a man having property both in *India* and in *England* to die, and make *A* his executor for the management of his property in *India*, and *B* for the management of that in *England*; if *B* receive intelligence that property of the testator is upon the sea on its way to *England*, will it be contended that he might not insure? He might be a trustee for unknown persons, for contingent interests, perhaps for infants; it is not necessary that it should be known for whom he was a trustee, but nobody can hesitate to say that *ex necessitate* he may insure for the benefit of all those who might be entitled to claim under the trust. Suppose a merchant upon his marriage to covenant with trustees in his marriage settlement that certain ships then upon the sea should when they came to *England* be vested in them for the purposes of the settlement, are we to be told that the trustees might not insure, because the settlor did not in terms convey and assign

1801.

LUCENA v. CRAUFURD and Others; in Error.

over the ſhips immediately? A Court of Equity would conſider the intereſt in the truſtees exactly the ſame as if the ſhips had been immediately conveyed. It is objected however that the *Dutch* Commiſſioners did not reſemble conſignees, becauſe they were directed to ſell and diſpoſe of the property entruſted to them according to the directions which they ſhould receive from Government. But many conſignees receive goods with orders to attend the directions of the conſignor as to their diſpoſal, and yet they are not the leſs able to inſure. So every truſtee is ſubject to the directions either of the *ceſtuy que truſt*, or of the Court of Chancery. The *Dutch* Commiſſioners would not have been at liberty to diſobey the directions of Government from whom their Commiſſion was derived, but in default of directions they like other conſignees and truſtees had the ſole management in themſelves, and might act upon their own judgment. Conſidering the circumſtances which gave riſe to the act of Parliament under which the Commiſſion iſſued, it ought to receive a large and liberal conſtruction from the Court. If Lord *Mansfield* was correct in the caſe of *Le Cras* v. *Hughes* in ſtating that a prize agent had an inſurable intereſt, ſurely theſe Commiſſioners who ſtand in the character of public, parliamentary, and national agents and truſtees had an intereſt which they might legally inſure. The opinion of Lord *Kenyon* in *Craufurd* v. *Hunter* adds much to the weight of Lord *Mansfield*'s great opinion upon this point, where ſpeaking of *Le Cras* v. *Hughes* he ſays, "with one part of that caſe I fully concur, and on that no doubt can be entertained, *viz.* that an agent to a prize has ſuch an intereſt in the ſhips coming home that he may inſure, and in ſo deciding Lord *Mansfield* only proceeded upon principles previouſly ſettled and eſtabliſhed." If therefore it be argued that the intereſt was not complete in the Commiſſioners till the arrival of the ſhips, and that the inſurance therefore was premature, the opinions of Lord *Mansfield* and Lord *Kenyon* give this anſwer, that an inchoate intereſt though imperfect till a given contingency ſhall have taken place is nevertheleſs inſurable. It is not neceſſary in this view of the ſubject to enter into the queſtion how far contingent profits may be inſured, or how it was Lord *Mansfield*'s intention to ſupport inſurances of that kind. Theſe Commiſſioners had not a mere ideal expectation of probable intereſt, but an intereſt veſted in them as truſtees. If indeed at the time of making the inſurance no ſeizure had been made and the Commiſ-

ſioners

ſioners had merely ſpeculated upon the probability of future ſeizure, the policy would have been void, as an inſurance upon a mere poſſibility. But in the preſent caſe there was an actual intereſt in the Commiſſioners which nothing could prevent from being reduced into poſſeſſion but the perils of the voyage againſt which the underwriters, with full knowledge of all the circumſtances, undertook to inſure them. From this courſe of reaſoning it follows that the judgment of the Court of *King's Bench* ought to be affirmed.

The learned Judges who delivered opinions to the above effect were *Graham* B., *Rooke* J., *Thompſon* B., *Hotham* B., *Macdonald* Ch. B. and Lord *Alvanley* Ch. J., the latter of whom added, that he was authoriſed to ſay that Mr. Juſtice *Heath*, who was prevented from attending by indiſpoſition, concurred in opinion with the majority of the Judges.

CHAMBRE J. was of a contrary opinion. The queſtions that ariſe in this cauſe are introduced by a bill of exceptions tendered to and allowed by the Noble Lord, before whom the action was tried at *Guildhall*. The ſubſtance of the record has already been ſtated, and I ſhall not repeat the ſtatement at large. The action appears to be brought by the Plaintiffs upon a policy of aſſurance effected by them in their character of Commiſſioners for the care and management of ſuch *Dutch* ſhips and cargoes as ſhould be detained in or brought into the ports of this kingdom. The Defendant is an underwriter on that policy; and the Plaintiffs have declared againſt him in ſeveral counts; but a verdict having been given for the Defendant upon all thoſe counts but the firſt: the queſtions now to be decided ariſe upon that count only, and upon the evidence ſtated in the bill of exceptions as applicable to that count. The ſubject of the inſurance is certain *Dutch* ſhips and cargoes bound for the United Provinces, but which by his Majeſty's orders had been taken at ſea, and carried into *St. Helena*, to be brought from thence into the ports of this kingdom, which was the voyage inſured, and in which the loſs happened: and the material averments are, that if they had arrived the Plaintiffs upon their arrival would by their Commiſſion have been authoriſed to take them under their care and diſpoſition according to the effect of the Commiſſion; that they were intended to be brought to *London* for thoſe purpoſes; that the Plaintiffs as Commiſſioners were intereſted in the ſhips and cargoes to the full amount; and that the

1802.
Lucena v. Craufurd and Others in Error.

insurance was made for their use, benefit, and account as Commissioners. The Plaintiffs' Commission, dated the 13th *June* 1795, is set forth in the evidence given by the Plaintiffs, and it conforms to the directions of the 35 *Geo.* 3. *c.* 80. under the authority of which act it was granted, and gives all the powers authorised by that act to be given to such Commissioners. His Majesty's instructions of the 9th *February* 1795 to the Commanders of his ships of war (which are also stated) are to bring into the ports of this kingdom all *Dutch* vessels bound to or for any port in *Holland;* that they and their cargoes being *Dutch* property may be detained provisionally. There is also evidence of the taking of the ships in question under those instructions, and of the formal parts of the declaration respecting the policy, the voyage, and the loss. The rest of the evidence I need not repeat. Whether under these circumstances the Plaintiffs are entitled to recover upon that count of the declaration, on which alone they have taken their verdict, is the matter to be decided. I feel myself in somewhat an unpleasant situation, having reason to believe that the opinion I entertain upon this case may not have any support from the opinions of those to whose superior judgment I have long and justly been accustomed to defer (*a*); but so far as respects the parties in dispute I certainly shall not regret that my opinion is overruled, as I do not see upon what honourable principle the performance of their contract is resisted by the Defendants who have not been deceived, but have made their contract with full knowledge of all the circumstances of the case, though at the same time I think myself bound to declare what I apprehend (however erroneously) to be the legal result of the evidence as applied to the declaration; and I am of opinion that the Plaintiffs ought not to recover, having, as I conceive, had no insurable interest in the subject attempted to be protected by this insurance. Probably as the property in question at the time of the insurance was not the property either of his Majesty or any of his subjects; and the utmost that could be said of it was, that it was in a situation in which it was likely to become *British* property, an effective insurance might have been made upon these ships requiring no proof of interest, but we must take this policy and this declaration as they are, and not as they might have been; and the reasons I have to offer in support of my opinion will apply only to these two points, that the Plaintiffs were under the

(*a*) Mr. J. *Chambre* delivered his opinion immediately after Mr. *B. Graham*, and before the rest of the Judges had spoken.

necessity

necessity of proving an interest, and that they have failed in doing it. We are much indebted to the great industry and ability of the bar in bringing before us all the cases from whence any principle applicable to the question can be drawn, and in assisting us with every remark that can be useful to us in applying those cases. Indeed we are threatened on both sides with overturning a system, and creating infinite confusion in the mercantile world which ever way we determine. I do not see the case exactly in that point of view; on the contrary I think this case stands so particularly on its own basis, that if we decide against the right of action, we disturb no case that has ever been decided and sanctioned by the profession, or acted upon by merchants, though I fancy at least that by a contrary decision, we shall have the question of interest in such a state that nothing less than an act of Parliament, and one that cannot be frittered away by construction, will be sufficient to fix the legal meaning of an interest in cases of insurance. Having formed this opinion on the particular circumstances of the particular case, I shall travel very little out of it, and shall have but very little occasion to take notice of the multitude of cases that have been cited. The first point to be considered is, whether upon the policy and declaration the Plaintiff (if he can recover) can do so otherwise than as upon a contract of indemnity. I think the Defendant's counsel by the authorities they have cited have proved these propositions; that by the law of merchants, and particularly by the law of *England* as it stood at the time of passing the act 19 *Geo.* 2. a wager policy, in which the parties by express terms, such as the words "interest or no interest," or "without proof of interest," disclaimed the intention of making a contract of indemnity, was then (contrary to older determinations) deemed a valid contract of insurance, but that a policy containing no such clause, disclaiming or dispensing with the proof of interest, was to be considered as a contract of indemnity only, upon which the assured could never recover without proof of an interest. *A fortiori* such proof of interest was necessary, when by the express terms of the policy the parties, as in the present case, declared the insurance to be upon interest, and that the object of the assured was to be indemnified only. It was no answer to say the policy states what the supposed interest was, and the insurers were not deceived: the legal consequence was and still is, that the contract is void; there being no interest there

1802.

LUCENA v. CRAUFURD and Others; in Error.

there can be no loss, and consequently no indemnity required. This appears by the case of *Martin* v. *Sitwell*, 1 *Sho.* 156. and may be collected from other cases cited in the argument. It seems that the statute 19 *Geo.* 2. strongly confirms the doctrine, that an express exclusion of interest was necessary, because the recital does not speak of wager or gaming policies generally, but only refers to the particular language of the policy by which interest was excluded, and in the enacting part that is the first thing prohibited. Indeed in the case before the Court it has been admitted, and I think properly so throughout the argument, that the Plaintiffs were bound to prove an insurable interest; and supposing that to be so it remains to be considered whether they have proved it. Much the greater part of the authorities that have been cited have been applied to this latter question; and though they have been observed upon with great ingenuity, I cannot discover that they have been at all assimilated to the case before the Court, or that they afford any other argument than this; that inasmuch as Courts of Law have gone considerable lengths in some cases to protect insurances where the interests insured have been contingent, or in some degree uncertain and indirect, they are to go all lengths and consider every thing an interest which the parties chuse to call so. I am not disposed to question the authorities in general; on the contrary there appears to me to have been great propriety in establishing the contract of insurance wherever the interest declared upon was in the common understanding of mankind a real interest in or arising out of the thing insured or so connected with it as to depend on the safety of the thing insured and the risk insured against, without much regard to technical distinctions respecting property, still however excluding mere speculation or expectation, and interests created no otherwise than by gaming. What the parties themselves may do they may also do by their trustees, consignees, or agents, provided the act done by an agent comes within the scope of the authority given him by his principal, either expressly or impliedly from the nature of his employment. The insurance of freight is one of the instances relied upon in argument. It would be a strange thing if freight could not be the subject of protection by an instrument which had its origin from commerce, and was introduced for the very purpose of giving security to mercantile transactions. It is a solid substantial interest ascertained by contract,

and

and arising from labour and capital employed for the purposes of commerce; but even in this case the existence of a subject out of which freight may arise or be earned is necessary, as is settled by the case of *Tonge* and *Watts* lately cited and approved of by Lord *Kenyon* in the case of *Thompson* v. *Taylor*. The insurance of profits ascertained by positive contract may be equally just and reasonable, and is hardly to be distinguished in principle from the case of freight. This was the case of *Grant* v. *Parkinson* one of the cases mainly relied upon by the Plaintiffs, though I confess I do not see how it applies to the present question. A mere speculation on profit is not insurable. The interest of a captor entitled by prize acts or proclamation to have the property condemned to him has an inchoate right. It would be strange indeed if he could not insure. That he may was settled in the case of *Boehm* v. *Bell*, *East Term Rep.* 154. In the case of life insurances it is truly observed that the real subject of insurance is the property connected with and depending on the life; the loss of the life being only the peril by which that property is affected or lost. The cases of trustees, of *cestuy que trusts*, of consignees and agents call for but little observation. No doubt a trustee who has the whole legal estate may insure. The *cestuy que trust* has the beneficial interest, surely he may insure. Then as to the agent the question must always depend upon the nature of his agency. A prize agent (though there is no decided case on the subject, and it seems uncertain whether Lord *Mansfield* meant that he might insure the prize or his commission) may possibly be entitled to make an insurance as being authorised to do so by his principal: but before any cases on this subject can apply it must be shewn that there was a subject of agency existing and that the authority was not more extensive than that which the present Plaintiffs had under their commission. I shall observe no further upon the cases, but proceed to an examination of the authority which the Plaintiffs really had and the state of the subject of the insurance. For this purpose recourse must be had to the Stat. 35 *G.* 3. *c.* 80. on which their commission is founded. The first part of the act is only auxiliary to a prior Stat. passed in the same year and the orders of Council therein recited, and it regards only the property secured here for *Dutch* friends who continued to be considered as such notwithstanding the hostile instructions issued on the 19th *February* preceding. Then in the 21st section the act proceeds to direct measures of security against

1802.
LUCENA
v.
CRAUFURD
and Others
in Error.

those subjects of the United Provinces from whom hostilities were apprehended. It has reference to the proceedings under the instructions, and after reciting that many ships of the United Provinces and other ships with the goods of such subjects on board had been or might thereafter be detained in or brought into the ports of this kingdom, and that such cargoes and such goods and vessels might perish and be greatly injured if no provision was made respecting the same. It enacts that the King, with the advice, &c. might grant commissions to three or more persons authorising them to take such ships and cargoes into their possession and under their care, and to manage, sell, or otherwise dispose of them to the best advantage according to such instructions as they should from time to time receive from his Majesty, with the advice of the Privy Council. The 38th section gives a similar authority with respect to the proceeds of such cargoes of ships so detained, as being of a perishable nature, had been ordered to be sold before the act, empowering the Commissioners to give the like directions respecting such proceeds as if the sales had been made under the authority of their commission. The subject of the commission so to be granted is, I think, clearly and plainly described. It is property actually within the ports of the kingdom not confiscated but detained by a kind of embargo. The sole intent of the commission was, I think, to prevent the property in that state from perishing or receiving damage in our harbours. Such being the intent it gives no general disposing power even to the Council, much less to their ministerial officers the Commissioners, who have no power of sale or absolute disposition except so far as in the discretion of the Privy Council should be found necessary or expedient to prevent loss or damage to perishable cargoes. Acting alone and without the directions of the Council, I do not find that even with respect to ships and cargoes actually detained their authority extends further than to the care and custody of them. But at the time of the insurance in question the ships had not arrived in *England:* the property was unchanged and remained in the original owners, who had no connection with the Commissioners; and without forming an idea of interest as something totally unconnected with property, I cannot entertain the opinion that the Plaintiffs have proved an interest in themselves either as owners, trustees, agents, factors, consignees, or otherwise. How can it be contended that officers merely ap-

pointed by Government for a political purpose with powers so limited as theirs were, and applied to limited objects within the description of which the property insured never came, had an insurable interest? Whom do they represent? Not the proprietor, he has given no consent. There can be no implied authority. The full extent of it must appear in the commission itself. Their situation has been compared to that of a consignee: as it strikes me no two situations can be more dissimilar. By the delivery of the bill of lading the property is vested in a consignee though it is a defeasible property: he has the controul and disposing power even while the goods are at sea; he can transfer them by indorsement so as to bind even the general owner for a valuable consideration. Have the Commissioners any of these powers or any thing like them, or any power at all over the property before arrival? It is said that there was nothing between the assured and the property but the perils of the voyage. There were many things. There was the event that has happened, of a declaration of hostilities, by which the nature of the property was altered and all possibility of its becoming subject to the authority of the Commissioners under their commission, whatever that authority might be, was at an end. A different direction from Government as to the destination of the ships and cargoes; even the act of the captain in carrying them into a different kingdom, as happened in respect of the ships that arrived in *Ireland*; a renewal of amity with *Holland*, any of these circumstances would have had the same consequence: but whether the position be true or false the great objection appears that there never was any consignment of these specific ships and cargoes to the Plaintiffs. If the Plaintiffs were now to recover I really do not know for whom they would be trustees in respect of the damages recovered; but it is not necessary to pursue that inquiry. I do not think myself obliged, nor do I think a Court of Justice ought to strain their faculties for the purpose of creating interests existing only in imagination, and this to defeat the wise policy of the Law explicitly declared by the Stat. 19 *G.* 2. It is true this is not a case under the statute: but it is a case of interest, and nothing can constitute an interest in this case which would not constitute an interest under the statute. The opinion therefore which I think myself bound to give upon this judgment is, that it ought to be reversed.

1802.
Lucena v. Craufurd and Others; in Error.

A majority of the Judges being of opinion that the judgment of the Court of *King's Bench* should be affirmed, the judgment was accordingly affirmed.

The King *v.* M'Gregor.

In an indictment on the 39 *Geo.* 3. *c.* 85. against a servant for embezzling money received on his master's account, it is not sufficient to follow the words of the statute, but there must be a positive allegation that the money was the property of the master, as in other cases of larceny.

This was an indictment against the prisoner on the 39th *Geo.* 3. *c.* 85 (*a*), alleging that he on, &c. at, &c. "then and there being a clerk to *G. S.*, *W. C.*, &c. &c. and employed by them in the capacity of such clerk, did by virtue of such his employment receive and take into his possession a large sum of money, to wit, the sum of 300*l.* for and on the account of the said *G. S.*, *W. C.* &c., the said masters and employers of him the said *J. M'Gregor*, and that he the said *J. M'Gregor* afterwards, to wit, on, &c. at, &c. fraudulently and feloniously did embezzle and secrete the said sum of 300*l.* against the form of the statute in such case made and provided, and so the jurors aforesaid upon their oath aforesaid, do say, that the said *J. M'Gregor* then and there, to wit, on, &c. at, &c. feloniously did steal, take, and carry away the said sum of 300*l.* from the said masters and employers of him the said *J. M'Gregor*, on whose account the said sum of 300*l.* was so taken into the possession of him the said *J. M'Gregor*, being such clerk so employed and by virtue of such his employment as aforesaid, against the form of the statute, &c. and against the peace," &c.

Upon this indictment the prisoner was tried at the *Old Bailey* Sessions in *January* last and was found guilty, but the judgment was respited in order that the opinion of the Twelve Judges might be taken upon the indictment.

Accordingly the case was argued on the 5th of *February* before ten of the Judges (*absentibus* Lord *Kenyon* Ch. J. and *Heath* J.) in the Exchequer Chamber.

(*a*) Entitled "An act to protect masters against embezzlements by their clerks or servants." The preamble of the act runs thus: "whereas bankers, merchants, and others are in the course of their dealings and transactions frequently obliged to entrust their servants, clerks, and persons employed by them in the like capacity with receiving, paying, negociating, exchanging or transferring money, goods, bonds, bills, notes, bankers' drafts and other valuable effects and securities; and whereas doubts have been entertained whether the embezzling of the same by such servants, clerks, and others so employed by their masters amounts to felony by the law of *England*;" the act proceeds to enact the offence as stated in the indictment.

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Knowlys for the prisoner. This indictment cannot be supported: for the offence with which it professes to charge the prisoner is a larceny; and if it be a larceny that offence is not sufficiently alleged. The 39 *Geo.* 3. *c.* 85. after reciting that doubts had been entertained whether the embezzling of money entrusted to servants, clerks, and others, amounted to felony by the law of *England*, enacts that if any servant or clerk shall by virtue of his employment receive into his possession any money, goods, &c. in the name of or on the account of his master or employer, and shall fraudulently embezzle, secrete, or make away with the same he shall be deemed to have feloniously stolen the same from his master or employer for whose use, or in whose name, or on whose account the same was delivered to or taken into his possession. The Legislature therefore having expressed doubts whether the stealing under the particular circumstances stated amounted to felony at common law, it must now be taken that in passing that act the Legislature did not consider it as amounting to felony. Now though the act provides that offenders of the description therein stated shall be deemed to have feloniously stolen, it does not make such stealing a felony *eo nomine*. For wherever a statute raises any fact into a felony *eo nomine*, it is always expressly enacted that such fact shall be deemed a felony, or that the offender shall be deemed a felon. Thus in the Coventry act, 22d and 23d *Car.* 2. *c.* 1. *s.* 7 it is said that persons maliciously maiming and wounding "shall be and are hereby declared to be felons." So it is provided by the Black Act, 9 *Geo.* 1. *c.* 22. that offenders against that act "shall be adjudged guilty of felony." The same words are used in the 7 *Geo.* 2. *c.* 21. respecting offenders committing assault with intent to rob. But the act in question does not declare either that the embezzling shall be deemed felony or the offender adjudged a felon; but only refers the facts to a class of felonies the properties of which are well known to the common law, *viz.* to the class of larceny, and makes a person under certain circumstances a *larron* who would not have been so before (*a*). The Legislature intended that embezzling the master's property by the servant, should from that time constitute the crime of larceny and no other, as appears from the doubts expressed in the preamble, whether it amounted to felony at common law, and from the consideration that in the few

(*a*) The words are, "shall be deemed to have feloniously stolen the same from his master," &c.

cases

1802.
The King v. M'Gregor.

cases in which the embezzlement of the property of others has been attempted to be treated as a felony, the only question has been, whether it was larceny or not? Thus in *Rex* v. *Meers*, 1 *Show*. 53. a case is cited where a journeyman who had embezzled money received for his master and left it in his chamber in his master's house, and being discharged entered the house in the night and took the money from the chamber, it was held to be no burglary because the taking the money did not amount to felony, that is to larceny, the money not having been taken out of the possession of his master. The same principle seems to have been adopted in *Rex* v. *Bull* cited in *Bazeley*'s case (*a*), 2 *Leach*. 980. ed. 3. This construction of the statute is fortified by the expression "shall be deemed to have feloniously stolen the same," since the "words feloniously stolen" have been at all times used by the Legislature to describe the crime of larceny: as appears from 1 *Ed*. 6. *c*. 12. *s*. 10, and 3 *Ed*. 6. *c*. 3., 8 *Eliz*. *c*. 4., 22 *Car*. 2. *c*. 5. *s*. 3., 3 *Will*. & *Mar*. *c*. 9. *s*. 1., 10 & 11 *Will*. 3. *c*. 23. *s*. 1., 12 *Ann*, *c*. 7., and 24 *Geo*. 2. *c*. 45. If then the felony created by this statute be not an embezzlement or feloniously stealing *eo nomine*, but a larceny, it ought to have been described as such in the indictment, and it should not only have been averred that the prisoner feloniously took, stole, and carried away the goods in question, but that those goods were the property of some other person. "Larceny by the common law is the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods *of another*, neither from the person nor by night in the house of the owner." 3 *Inst*. 107. So in 1 *H. P. C.* 504. the definition of *Bracton* and *Britton* is adopted, which is "*fraudulenta contrectatio rei alienæ cum animo furandi invito domino cujus res illa fuerit*." It is therefore of the substance of the crime of larceny that the thing stolen should be *res aliena*; and it is laid down in 2 *Hawk*. *c*. 25. *s*. 60. that "the want of a direct allegation of any thing material in the description of the substance, nature, or manner of the crime cannot be supplied by any intendment or implication whatsoever." If it be said that the crime committed is described in the words of the statute, still if the crime created by the statute be larceny, it must be described as such.

Best Serjt. for the prosecution. This is an indictment on a statute, and where a particular offence is created by a statute it is

(*a*) Which case gave rise to the passing of the 39 *Geo*. 3. *c*. 85.

sufficient to follow the words of that statute in describing the offence. Now the indictment in the present case states all those circumstances attending the transaction, which under the provisions of the act constitute the offence. It is true that to constitute the crime of larceny the property taken must belong to some person; but there is a great difference between larceny at common law and the offence created by this statute, which is a new offence. Where indeed an act of Parliament declares that if a larceny be committed under particular circumstances, the punishment shall be aggravated, there it remains a larceny at common law and must be treated as such in the indictment. But here the Legislature considering that those circumstances which by the act in question are now declared to amount to larceny, did not before that statute amount to that offence, have in terms described the circumstances which should for the future be punished as larceny, and have therefore created a new offence and not adapted a new punishment to an old offence. If indeed this offence had been larceny before the act, an offender would have suffered the same punishment before the act as he now receives under the provisions of the act, and the whole enactment would have been nugatory.

1802.

The King v. M'Gregor.

At the *Old Bailey* Sessions in *April* following *Thompson* Baron delivered the opinion of the Judges that the indictment was defective for the objection taken by his Counsel; for that the new offence created by the act of Parliament being a larceny, it must be described in the indictment as such and with all the properties of a larceny.

Larkins v. Larkins (a).

The following certificate has been sent to the Lord Chancellor.

This case has been argued before us, and we are of opinion that the devise of the estate in *Middlesex* to *John Pascall Larkins* and *Samuel Enderby*, to whom together with *George Smith* the said estate was devised as joint tenants in trust to be sold, was not revoked by the testator's having struck out the name of the said *George Smith* after the execution of the said will.

Alvanley.
G. Rooke.
A. Chambré.

(a) Vid. *ante*, p. 16.

1802.

REGULA GENERALIS.

Friday, 12th *February*. It is ordered that from henceforth all arguments upon demurrers and other arguments in this Court be heard on *Mondays* and *Thursdays* only.

ALVANLEY.
G. ROOKE.
A. CHAMBRE.

END OF HILARY TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Easter Term,

In the Forty-second Year of the Reign of GEORGE III.

DURING the *Easter* Vacation the Right Hon. *Lloyd* Lord *Kenyon*, Lord Chief Justice of the Court of *King's Bench*, died at *Bath*.

Sir *Edward Law* Knight, his Majesty's Attorney General, succeeded to the situation of Lord Chief Justice of the Court of *King's Bench*, and was created a Peer of the United Kingdom of *Great Britain* and *Ireland* by the title of Lord *Ellenborough*, Baron of *Ellenborough* in the county of *Cumberland*.

The Hon. *Spencer Perceval*, Solicitor General to his Majesty, succeeded to the office of Attorney General.

And *Thomas Manners Sutton* Esq. Chief Justice of the *North Wales* Circuit and Solicitor General to his Royal Highness the Prince of *Wales*, was appointed Solicitor General to his Majesty, and was knighted.

BUCKLER *v.* RAWLINS.

May 6th.

If an appearance be entered in the name of an agent to the attorney for the defendant, and the plea be delivered in the name of the latter, and the plaintiff thereupon enter up judgment for want of a plea, the Court will set aside that judgment for irregularity.

THIS was a rule calling upon the Plaintiff to shew cause why the judgment signed in this action should not be set aside for irregularity.

It appeared that the Defendant had given a warrant of attorney to Mr. *Charles Arnold*, an attorney of this Court, to defend the action, that Mr. *Arnold* had employed Messrs. *Cardale*, *Halward* and

1802.

BUCKLER v. RAWLINS

Spear, also attornies of this Court, as his agents in the cause; that Messrs. *Cardale*, *Halward* and *Spear* had given an undertaking to appear, and in pursuance of that undertaking had entered an appearance for the Defendants in their own names; that they afterwards obtained time to plead, and before the expiration of such time delivered a plea in which it was stated that the Defendant by *Charles Arnold* his attorney came and defended the wrong and injury when, &c. though the plea was indorsed *Cardale*, *Halward* and *Spear*, agents for *Arnold*; that a plea was afterwards demanded by the Plaintiff, and no other plea having been delivered the Plaintiff signed judgment.

Shepherd and *Best* Serjts. shewed cause and contended that the plea was irregular and therefore the judgment was warranted, for that as the appearance was entered in the name of *Cardale*, *Halward* and *Spear*, it was not competent to the Defendant to deliver a plea in the name of *Arnold*, without an order for leave to change the attorney; that the circumstance which had been stated that Messrs. *Cardale*, *Halward*, and *Spear*, were only the agents of *Arnold*, could make no difference since they had entered the appearance in their own names without making any mention of the principal; and that although Mr. *Arnold* might have received a warrant to defend from the Defendant, yet the Plaintiff could know nothing of that circumstance and ought not to be affected by it.

Cockell Serjt. *contrà* insisted that the Plaintiff's attornies in this case had adhered to the uniform practice both of the *King's Bench* and of this Court: as to the former of which he referred to a certificate of the Master of the *King's Bench*, and as to the latter he was confirmed by the officers of this Court.

The Court understanding that it was the constant practice where agents are employed for them to enter an appearance in their own names and afterwards to deliver a plea in the name of their principal, thought the judgment irregular, and observed that if the plaintiff had thought proper to search he would have found that the warrant of attorney was given to *Arnold*.

Rule absolute (*a*).

(*a*) *Shepherd* Serjt. on the next day referred to the Appearance-book, which contained many entries of appearances, wherein it was expressed that the attornies appeared as agents and not principals, and urged that it appeared from these entries to be the practice for attornies when they appear as agents to state that circumstance in the *præcipe* from which the appearance is made out by the officer, which had not been done in this case. But the Court adhered to their former opinion.

M'CONNELL *v.* HECTOR.

May 10th.

A commission of bankrupt founded on the petition of *A.*, a *British* subject resident in *England* for a debt due to himself and his partners *B.* and *C.* also *British* subjects, but resident and carrying on trade in an enemy's country, cannot be supported.

THIS was an action of trespass *de bonis asportatis* directed by the Lord Chancellor for the purpose of trying a question of bankruptcy. The Defendant pleaded the general issue and two special pleas in the first justifying the taking under the statute 13 *Eliz.* *c.* 7. and in the second under the statute 1 *Jac.* 1. *c.* 15. To both the special pleas the Plaintiff replied *De injuriâ suâ propriâ absque tali causâ.*

The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* sittings after last *Hilary* term when a verdict was found for the Plaintiff, with liberty for the Defendant to move the Court to set that verdict aside, if, under the following circumstances they should think the commission of bankruptcy upon which the Defendant relied was valid. The commission issued on the petition of the Defendant who was resident in *England* upon a debt due to himself and his two partners *Alexander Reid* and *James Hector* subjects of this country but resident and carrying on trade at that time at *Flushing* a port belonging to the enemies of this country.

Best Serjt. now moved for a rule to shew cause why the verdict should not be set aside, and a new trial be had, contending that though it was true that if the debt upon which the petition issued was such as could not be sued for at law it would not be sufficient to support the commission, yet as all the three joint creditors were *British* subjects, the mere circumstance of two of them being resident and trading in an enemy's country would not bar their right to recover; for that in the plea of alien enemy it is necessary to aver that the Plaintiff was born out of the King's allegiance (*a*), and that he was adhering to the King's enemies, neither of which circumstances could have been alleged in this case: that the right of a natural born subject of the King can neither be forfeited by time or place, but only by his own misbehaviour, 1 *Bl. Com.* 371, and that as there was no pretence for saying that the two persons who were resident at *Flushing* had so adhered to the King's enemies as to

(*a*) See the opinion of *Eyre* Ch. J. in the case of *Sparenburgh* v. *Bannatyne*, *ante*, vol. 1. p. 167. from which it seems that it is not necessary to state the birth of the party in the plea of alien enemy.

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1802.

M'CONNELL v. HECTOR.

be guilty of treason, they had not forfeited their right to maintain an action for the debt upon which the commission was founded.

Lord ALVANLEY Ch. J. Most certainly every natural born subject of *England* has a right to the King's protection so long as he entitles himself to it by his conduct; but if he live in an enemy's country he forfeits that right. Though these persons may not have done that which would amount to treason, yet there is an hostile adherence and a commercial adherence; and I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of an hostile state, and who is so far a merchant settled in that state that his goods would be liable to confiscation in a court of prize, is yet to be considered as entitled to sue as an *English* subject in an *English* court of justice. The question is whether a man who resides under the allegiance and protection of an hostile state for all commercial purposes, is not to be considered to all civil purposes as much an alien enemy as if he were born there? If we were to hold that he was not we must contradict all the modern authorities upon this subject. That an *Englishman*, from whom *France* derives all the benefit which can be derived from a natural born subject of *France*, should be entitled to more right than a native *Frenchman* would be a monstrous proposition. While the *Englishman* resides in the hostile country, he is a subject of that country, and it has been held that he is entitled to all the privileges of a neutral country while resident in a neutral country (*a*). I cannot therefore entertain sufficient doubt upon this subject to grant a rule to shew cause.

ROOKE J. I think we ought not to grant a rule to shew cause. It is well known that if an alien enemy be residing here under the King's protection he may sue; but if an *Englishman* be resident in an hostile country the King cannot enable him to sue. The reason of the disability of the person residing in an enemy's country, is, that the fruits of the action may not be remitted to an hostile country and so furnish resources against this country. For that purpose the case of an *Englishman* residing abroad does not differ from any other person. I am of opinion therefore that the petitioning creditor could not have maintained an action in this country for that debt which is the foundation of the commission and consequently that the commission cannot be supported.

(*a*) *Marryatt* v. *Wilson*, *ante*, vol. 1. p. 430.

CHAMBRE J. The plea of alien enemy is either in bar or abatement of the action. Though I do not controvert what is laid down in general terms in *Blackſtone's Commentaries*, yet I think many diſtinctions ariſe out of that general propoſition, and I have no idea that the preſent commiſſion can be ſupported.

Beſt took nothing by his motion.

COMBER Adminiſtrator of COMBER *v.* HARDCASTLE and Another.

May 10th.

Plaintiff ſued as adminiſtrator upon a contract made with his inteſtate and aſſigned by the Plaintiff to *J. S.* for whoſe benefit the action was brought. It appearing that the contract had been annulled with the privity both of the Plaintiff and *J. S.* and that the former was indemnified by the latter, and a verdict being found for the Defendant, the Court made an order on the Plaintiff to pay the coſts.

THIS was an action of aſſumpſit brought by the Plaintiff in his character of adminiſtrator on a ſpecial agreement for the delivery of tallow entered into by the Defendants with the inteſtate in his lifetime. On the trial of the cauſe a verdict having been found for the Defendants a rule *niſi* was obtained calling upon the Plaintiff and *Robert Moate*, *Samuel Morgan* and *Thomas Pickard*, to ſhew cauſe why it ſhould not be referred to the Prothonotary to tax the Defendant's coſts in the cauſe and why the coſts ſo taxed ſhould not be paid to the Defendants by the Plaintiff or by the ſaid *R. M.*, *S. M.*, and *T. P.* This rule was obtained upon an affidavit ſtating that at the trial it was admitted that the ſaid *R. M.*, *S. M.*, and *T. P.*, were the perſons for whoſe benefit the action was brought, and that when the contract upon which the action was founded was produced in evidence it appeared by an indorſement thereon that it had been aſſigned by the Plaintiff to the ſaid *R. M.*, *S. M.*, and *T. P.*, who ſucceeded to the inteſtate's buſineſs and premiſes upon his death, and that it alſo appeared in evidence that the ſaid contract had with the privity and conſent of the ſaid *R. M.*, *S. M.*, and *T. P.*, or one of them (*a*), been annulled.

Beſt Serjt. ſhewed cauſe and inſiſted that according to the caſe of *Tatterſall* v. *Groote*, *ante*, vol. 2. p. 253. (*b*), the Plaintiff having ſued in his character of adminiſtrator on a contract made by the inteſtate in his lifetime and which therefore could not be put in ſuit by the Plaintiff in any other character, could not be called upon to pay coſts, and that the other perſons upon whom the rule *niſi* was made in the alternative could not be affected by any order of the

(*a*) It alſo appeared from Lord *Alvanley's* notes that the plaintiff himſelf had abandoned the contract. See the next page.

(*b*) Cited and confirmed in *Cooke* v. *Lucas*, 2 *Eaſt*. 395.

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1802. COMBER v. HARDCASTLE.

Court, for though they might in fact be the persons really interested in the suit, yet not being in any way before the Court as parties, the Court had no jurisdiction over them for such a purpose. He urged that if costs were awarded upon the record it would be error, and that the Court therefore would hardly do that by indirect means which they had no direct authority to do, and which might not when done be submitted to the revision of a court of error. He also observed that the privilege of the administrator to be exempt from the payment of costs where necessarily suing in that character was not affected by the circumstance of his suing for the benefit of others, since in *Wilton* v. *Hamilton*, *ante*, vol. 1. p. 445. an administratrix suing on a policy of insurance made in the lifetime of her husband whose representative she was, had been held not liable to pay costs, though the policy had been effected in her husband's name for the joint benefit of himself and two others who were living at the time when the action on the policy was commenced and might have put the policy in suit in their own names.

Shepherd and *Vaughan* Serjts. *contrà* were stopped by the Court.

Lord ALVANLEY Ch. J. So much has been said in this case respecting the right of the Court to make this order upon the Plaintiff, (for upon him only and not upon the other persons who are not parties before the Court the order must be made) that I think it necessary to state the grounds upon which I feel myself bound as a Judge to accede to this application. The Plaintiff (*a*) is the administrator of a person who in his life-time entered into a written agreement to accept a certain quantity of tallow at a particular time and price. After his death this contract being found among his papers, it was submitted to the opinion of his friends whether it would be for the benefit of his estate that this contract should be carried into effect; and it being determined that it was better for the estate not to run the risk arising from the speculation, an application was made to the Defendants to release the Plaintiffs from the agreement; which was acceded to by the Defendants, and the agreement put an end to. That fact the jury has found. From that time the agreement was mere waste paper, and whoever put it in suit, did so fraudulently. This paper however was not delivered up to the Defendants, and the price of tallow having

(*a*) These facts were not so fully stated in the affidavits, but the cause had been tried before his Lordship.

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risen, and *Moate*, *Morgan*, and *Pickard* having succeeded to the trade and premises of the intestate by purchase, have this paper assigned to them, the effect of which had been previously annulled. Though it does not appear upon the affidavits, yet it was avowed at the trial that *Moate*, *Morgan*, and *Pickard* in fact brought the action and indemnified the Plaintiff. The question is, whether under these circumstances we can oblige the Plaintiff to pay the costs of the action? I admit that an executor or administrator, necessarily suing as such, is not made liable to costs by the statute, and that no costs can be awarded against this Plaintiff on record. But we are to decide whether, as this Plaintiff has been guilty of an abuse of the process of the Court, we cannot order him to pay the costs for that contempt? The reason why an executor or administrator is excused from the payment of costs is, because he is not supposed to know the imbecillity of his own suit; which reason by no means applies to the present Plaintiff. It has been suggested by my brother *Rooke*, that where an executor or administrator introduces costs by his own neglect, as where he suffers himself to be nonprossed, he is liable to the payment of those costs. And certainly it does not follow from the statute not having given costs against executors or administrators, that where executors or administrators lend their names to other persons improperly, the Court has no authority to punish them.

ROOKE J. I am of the same opinion. It is clear upon the statute that where an executor or administrator necessarily sues as such he is not liable to costs. And yet it has been holden that where an executor or administrator is guilty of misbehaviour he shall pay costs. As where he suffers himself to be nonprossed (*a*); so where he has knowingly brought a wrong action, or otherwise been guilty of a wilful default, he shall pay costs upon a discontinuance (*b*), or for not proceeding to trial according to notice (*c*). Then if the Courts have so far got the better of the statute as to make executors and administrators pay costs in these cases, I see no reason why an administrator should not pay them where he brings an action contrary to his own agreement. I am therefore

(*a*) *Lamley* v. *Nicholls*, *Co. Ca. Pr.* 14. *Hawes* v. *Saunders*, 3 *Burr.* 1584. and *Higgs* v. *Warry*, 6 *T. R.* 654.

(*b*) *Haydon* v. *Norton*, *Co. Ca. Pr.* 79 *Barnes* 169. ed. 3. S. C. *Harris* v. *Jones*, 3 *Burr.* 1451. 1 *Bl.* 451. S. C. *Bennet* v. *Coke*, and 4 *Burr.* 1927.

(*c*) *Anon.* 7 *Mod.* 98. 118. *Elwes* v. *Mocata*, 2 *Ld. Ray.* 865. 1 *Salk.* 314. S. C. But where the omission to proceed to trial does not arise from the plaintiff's own default he shall not pay the costs. *Ogle* v. *Moffat*, *Barnes*, 133. ed. 3.

1802.

COMBER v. HARDCASTLE.

of opinion that we ought to make an order upon the Plaintiff to pay these costs.

CHAMBRE J. I am of the same opinion. With respect to the case of *Wilton* v. *Hamilton* which has been cited, the action was fairly brought by the executrix in respect of an interest claimed as due to the testator's estate; and though it were competent to either of the other two persons, who were jointly interested with the testator, to have brought the action, yet as the action was *bonâ fide* brought by the executrix, who had a right so to do for the benefit of the estate, there could be no pretence for making her pay the costs. The case of *Tattersall* v. *Groote* proceeded entirely upon the construction of the statute respecting costs. But here the case is quite different. A complaint is now made against the Plaintiff of a fraudulent abuse of the process of the Court in lending his name to other persons. This is a gross fraud. And what is there in the statute of costs which prevents the Court from punishing the Plaintiff for such misbehaviour?

Per Curiam, In drawing up the rule let it be referred to the Prothonotary to tax the Defendant's costs, and let it be ordered that the Plaintiff do pay the same. The judgment must be entered without costs.

May 10th.

WINDER *v.* WOOD.

The judgments in an original action and the judgments in the actions against the bail may be set aside upon one motion and one affidavit entitled in the original action.

A Rule having been obtained to shew cause why the judgment in the original action between these parties, as well as the judgments in the actions against the bail, should not be set aside;

Vaughan Serjt. objected that the rule had been obtained upon one motion only, and one affidavit entitled in the original action, whereas he contended there ought to have been several motions and several affidavits.

But *The Court* were of opinion that the rule had been obtained according to the usual practice; and that if the judgment in the original action failed the subsequent actions must fail also.

Bayley Serjt. for the Defendant.

RICHARDSON *v.* GOSS.

May 12th.

A. of *Newcastle* shipped goods for *London* to order of *B.*: before their arrival *B.* wrote to say that he was in failing circumstances, and would not apply for the goods on their arrival; to this *A.* returned a general answer, without making any mention of the goods, but immediately left *Newcastle* for *London*, and on his arrival applied at the wharf of *C.*, where the goods had in the mean time arrived, (and where goods shipped for *B.* usually were landed and kept till sent for by him) tendering the freight and charges paid for the goods, and requiring a delivery of them, which was refused unless upon payment of a general balance due from *B.* to *C.* for wharfage; Held that the contract as between *A.* and *B.* having been rescinded previous to the arrival of the goods, *C.* had no right to retain against *A.* for a general balance due to him from *B.*

Semble, that the goods were no longer *in transitu* when arrived at the wharf of *C.*, where the goods of *A.* were usually landed and kept.

TROVER for goods.

This cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Michaelmas* Term, when the following facts appeared in evidence. The goods in question (consisting of 118 hams and 25 sides of bacon) were shipped by the Plaintiff, who was a dealer in bacon and hams at *Newcastle*, on board the *Formosa*, directed to a person of the name of *Wilson* in *London*, by whom they had been ordered. On the 1st of *June* 1801, *Wilson* wrote and sent the following letter to the Plaintiff at *Newcastle*. "This serves to acquaint you that from a heavy disappointment I am deprived answering my engagements. It is distressing to say I am under the necessity to refuse my acceptances, the more so as your account is the heaviest I have. This unforeseen accident is caused by the embargo in the *Baltic*. I flatter myself by having time I shall surmount my difficulty, but if that cannot be allowed I must give every thing I have in satisfying my creditors. I have received the 4 hogsheads per *Neptune*, *Parkinson*, *but shall not apply for the 3 hogsheads by the* Formosa. Little did I think this would have been the case, or I would never have ordered any goods from you. Nevertheless if I meet with candour and patience I shall be able to surmount all my difficulties." This letter reached the Plaintiff at *Newcastle* on the 3d of *June*, and by return of post, *viz.* the 4th of *June*, the Plaintiff wrote to *Wilson* saying, "If I find you an honest man you shall have every indulgence from me," but making no mention of the goods on board the *Formosa*. As soon as the arrangement of his concerns would permit the Plaintiff set off from *Newcastle* for *London*, and arrived on the evening of the 7th of *June*. Previous to the letter of the 1st of *June*, *viz.* on the 22d of *May*, *Wilson* had directed the Defendant, at whose wharf goods were usually landed for him and kept till sent for, to receive the goods coming by the *Formosa*, and had accompanied his directions by an order to the Captain of the *Formosa*, in the usual form, to deliver them to the Defendant

1802. RICHARDSON v. GOSS.

or bearer. *Wilson* was indebted to the Defendant to a confiderable amount on a former account, as well as for the freight and charges of the goods in queftion, which arrived at his wharf on the 4th of *June*, and which the Defendant, not having been informed by *Wilfon* of his letter of the 1ft of *June* to the Plaintiff, paid. The Plaintiff on his arrival in *London* demanded the goods in queftion, and tendered to the Defendant the freight and charges; but the Defendant refufed to deliver them up unlefs upon payment of the general balance due to him from *Wilfon*. The jury found a verdict for the Plaintiff; but liberty was referved to the Defendant to move to have that verdict fet afide and a verdict entered for himfelf, if the Court fhould think him entitled thereto in point of law.

Accordingly a rule *nifi* for that purpofe having been obtained in the courfe of laft term

Bayley Serjt. fhewed caufe. The prefent verdict may be fupported upon two grounds, 1ft, That the goods in queftion before they came to the poffeffion of the vendee were ftopped *in tranfitu* by the vendor: 2dly, That the contract having been refcinded by the confent of the parties before the goods came to the wharf of the Defendant, the property in them revefted in the Plaintiff, and confequently the Defendant has no lien upon them but for the amount of the freight and charges. With refpect to the 1ft ground it is to be obferved, that till the arrival of the goods at the Defendant's wharf they were moft clearly *in tranfitu*, and that the mere landing them at the wharf does not put an end to the *tranfitus*, fince the wharf of the Defendant was not the ultimate place of their deftination. That the right of the vendor to ftop *in tranfitu* is not put an end to by delivery of goods to an agent appears from the cafe of *Hunter* v. *Beal*, cit. 3 *T. R.* 466. where a delivery to an inn-keeper on their way to the vendee, was held not to affect the vendor's right, though the inn-keeper had informed the vendee of his receipt of the goods for him, and actually fent them to a quay to be fhipped on account of the vendee in obedience to his orders, but being too late to be fhipped, they were fent back to the inn-keeper, and afterwards claimed by the vendor. [*The Court* feemed to incline againft the Plaintiff upon this point, becaufe *Wilfon* appeared to have ufed the Defendant's wharf as his own warehoufe, and expreffed a wifh rather to hear the fecond point argued.] *Wilfon* having propofed to the Plaintiff on the 1ft of

1802. RICHARDSON v. GOSS.

of *June*, when the goods were certainly *in transitu* that the contract should be rescinded, and the plaintiff having acceded to that proposal, the goods must be considered as having revested in the Plaintiff from the 1st of *June*. That it was competent to *Wilson* to rescind the contract under the circumstances in which he stood appears clearly from *Atkin* v. *Barwick*, 1 *Str.* 165. the decision of which case has been uniformly approved, though the reasons on which the judgment proceeded have been sometimes impugned; as in *Harman* v. *Fisher*, *Cowp.* 125. and *Neate* v. *Ball*, 2 *East.* 124. That case decides that although the goods reach the vendee, yet if he refuse to accept them, such refusal will have the effect of rescinding the contract from the time of the refusal, though the assent of the vendor is not given till afterwards. In the case of *Salte* v. *Field*, 5 *T. R.* 211. where the contract was rescinded by a countermand of a prior order of the goods by the vendee, the *jus tertii* had as in this case intervened, for the goods had been attached in the hands of the vendee's packer. Immediately on the receipt of *Wilson*'s letter the Plaintiff came up to town, and the first thing he did was to demand his goods from the Defendant; if there was no positive assent therefore to the rescinding of the contract by the Plaintiff, still his conduct evinced that assent most unequivocally. If then the contract were rescinded from the 1st of *June*, when the goods arrived at the Defendant's wharf they were the property of the Plaintiff and not of *Wilson*, consequently the Defendant could have no lien for the general balance due from the latter, and this defence must be considered as an attempt on his part to discharge the debts of *Wilson* with the Plaintiff's property.

Shepherd Serjt. in support of the rule. The Defendant having a lien for his general balance upon all goods belonging to *Wilson* which should come into his hands, and having received the goods in question from *Wilson* under an order given to him for that purpose, he has in fact received them in the nature of a pledge. Now no case can be stated in which the vendee of goods has been allowed to rescind the contract so as to divest the rights of a third person. So many observations have been made upon the case of *Atkin* v. *Barwick*, that it cannot be considered of any very great authority: and indeed that case goes no further than to determine that where the vendee offers to rescind the contract before he has done any act to give any right in them to a third person, and that offer is accepted

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1802.

RICHARDSON v. GOSS.

by the vendor, the property in the goods is revested in the latter. With respect to *Salte* v. *Field*, the contract as between the parties was determined to have been rescinded before the goods came into the hands of the packer: but in that case the packer claimed no lien; consequently the case affords no ground for deciding against the lien of the Defendant. In the late case of *Neate* v. *Ball*, the Court of *King's Bench* decided against the attempt of the vendee to rescind the contract after the goods had once been received; for though it was before the act of bankruptcy, yet being in contemplation of it, the attempt was held void. In this case the Plaintiff derives his right to take back the goods under the letter of the 1st of *June*, that is under an act of *Wilson* before the delivery of the goods, but not communicated to the Defendant. The attempt therefore to rescind the contract on the part of *Wilson* was a secret act in fraud of the Defendant, who received the goods upon the faith of the lien for the general balance of accounts. Had the circumstance been communicated to the Defendant before the delivery it would have been otherwise: and possibly the Defendant was induced to forbear arresting *Wilson* for the debts due to him upon the expectation of discharging the balance by the goods directed to his wharf. The whole therefore of the Plaintiff's claim is made through an act done by *Wilson* in fraud of the Defendant. It may be observed moreover that the answer of the Plaintiff to *Wilson*'s offer to rescind the contract is not a direct assent, but leaves the matter open to be decided upon as he should find most advantageous upon his arrival in *London*. Now in *Smith* v. *Field*, 5 *T. R.* 402. it was decided that unless there be an assent of the vendor the contract is not rescinded. The present case differs essentially from that of a stoppage *in transitu*, where the right to take the goods arises out of the original property of the consignor: but here when the goods were seized the *transitus* was at an end, and the only right to take them was derived from an agreement of the vendee to rescind the contract: the Plaintiff therefore claimed under the vendee, and before he could take the goods he ought to have satisfied all the charges to which the latter might have subjected them. If *Wilson* instead of rescinding the contract had sold the goods to a stranger, could such a person have taken them out of the hands of the Defendant without satisfying the general balance? If then such a purchaser could not, neither could the Plaintiff, for both must equally claim under *Wilson*.

Lord ALVANLEY Ch. J. Suppose a wharfinger to have a general authority to receive all goods directed for *A. B.*, and that goods come to his wharf by mistake directed for *A. B.* It is quite clear that the real owner of the goods could not take them away without paying the charges incident to those particular goods: but it is equally clear that the wharfinger could not set up a lien on such goods for a general balance of accounts due from *A. B.* to him. The question therefore is, Whether the contract between the Plaintiff and *Wilson* was not completely put an end to before the goods were received? And unless it can be shewn that the goods did not come into the hands of the Defendant, as the goods of the Plaintiff, it appears to me that the latter will be entitled to recover. If indeed the Defendant had been induced to advance money or accept bills upon the expectation of the arrival of the goods, he might have acquired a lien upon them to the amount of the credit given upon those specific goods, the party to whom such credit was given having had a right to direct the goods to his wharf at the time when it was given. This was the case of *Hammonds* v. *Barclay* (a). But it would be going too far to say that because *Wilson* omitted to countermand his order when he ceased to have any right over the goods the Defendant is entitled to a lien upon those goods for the general balance due from *Wilson*. Notwithstanding therefore any doubts which I may have entertained upon the subject I am now clearly of opinion that the Plaintiff is entitled to recover. No question arises in this case between the assignees of *Wilson* and the Plaintiff respecting the intervention of any act of bankruptcy: it was therefore clearly competent to *Wilson* on the 1st of *June* to revoke the order which he had given to *Richardson*, and to renounce his right to any goods on their passage provided *Richardson* would permit him so to do. On the 1st of *June* then *Wilson* writes that he shall not apply for the three hogsheads by the *Formosa*; and this letter is received at *Newcastle* on the 3d of *June*. It has been contended that the answer to this letter does not amount to an acceptance on the part of the plaintiff of the offer made by *Wilson* to determine the contract; but it does appear to me that, short of a positive expression of acceptance, it is as strong an acceptance as could be signified; and the Plaintiff must have reasoned unlike other men not to have assented to rescind a contract, the execution

(a) 2 *East.* 227.

1802.
RICHARDSON v. GOSS.

of which would be disadvantageous to himself. Immediately after answering *Wilson's* letter of the 1st of *June*, the Plaintiff set out for *London*, and on his arrival in *London* shewed no hesitation in taking to the goods, but on the contrary claimed them directly from the Defendant. It is true that the Defendant having received the goods without being informed of *Wilson's* letter had executed the authority given him by *Wilson* before the Plaintiff's arrival: and unquestionably it was an act of neglect in *Wilson* not to inform the Defendant that the contract between himself and the Plaintiff was determined, and that the Defendant was not to receive the goods on his account; which omission if it had been wilful would have amounted to a fraud in *Wilson*. But this circumstance will not affect the Plaintiff's right if he assented to *Wilson's* offer: and I do not feel that we shall violate any principle of law in considering the conduct of the Plaintiff as amounting to such assent. The Plaintiff tendered to the Defendant the freight and charges on the goods in question, which the latter refused, contending that by the custom of the trade, which is now considered as having become part of the contract between wharfingers and their customers, he was entitled to retain them for his general balance due from *Wilson*. It is true that as between the Defendant and *Wilson*, if the former had received the goods on *Wilson's* account and as belonging to him, the Defendant would have had a right so to retain them. But the question now is, Whether he can retain against *Richardson* for a balance due from *Wilson*, he the Defendant having got the goods into his hands without having been informed that the Plaintiff and *Wilson* had previously agreed to put an end to the contract? It is singular that the case of *Atkin* v. *Barwick* should have been often cited with disapprobation and never overturned, but that different judges should have supposed it to have proceeded upon different grounds. The true ground however seems to be that mentioned by Lord *Mansfield* and Lord *Kenyon* that the goods had never been accepted by the trader. Had the packer in the case of *Salte* v. *Field* set up a lien for his general balance that would have been precisely this case. But in that case the vendee had previous to the receipt by the packer countermanded the goods, to which countermand the vendor assented after an attachment had issued, though the goods were in fact deposited with the packer which ought not to have been so deposited; and the only question was, Whether the property reverted to the vendor so as to avoid the intermediate attachments

1802. RICHARDSON v. GOSS.

attachments of the creditors. Now I do not see any real distinction between the two cases. For although the question upon the lien of the packer did not arise, yet I do not see how the Defendant is to be distinguished from any other creditor of *Wilson* not claiming under a specific lien, but deriving his right to affect the goods under a debt due from *Wilson*. I admit that if *Wilson* had received money from the Defendant or the latter had accepted bills upon the faith of these goods, the Defendant would have had a right to retain, because the Plaintiff had invested *Wilson* with a power to make them liable to such a claim. But in the present case I am of opinion that common justice requires that the lien of the Defendant should not be extended beyond what was actually advanced by him upon these particular goods: and as the amount of all the charges incident to these goods was tendered by the Plaintiff, I think that he is entitled to recover.

HEATH J. I am of the same opinion. It was perfectly competent to the vendor and vendee to rescind the contract: and I think that the contract was rescinded by relation upon the 1st of *June*. This case differs from a case of bankruptcy: for there if any act of bankruptcy intervene between the offer to rescind and the assent, the assent comes too late to prevent the operation of the act of bankruptcy (*a*). Here therefore I think that the relation must take place agreeable to the reasoning made use of in *Atkin* v. *Barwick*; which though it has been thought by Lord *Mansfield*, Lord *Kenyon*, and other Judges, not to have been applicable to that case, is applicable to this. Here the wharfinger had no right to retain the goods against *Richardson*, who was no creditor, in respect of any thing but what had been laid out upon them: though if *Wilson* had demanded the goods the wharfinger would have had a right founded on custom to retain for his general balance. In this case no fraud appears, nor any suspicion of fraud, but a mere act of negligence on the part of *Wilson*, who certainly ought to have given notice to the Defendant of his having put an end to the contract. The title of *Richardson* was the preferable title: under these circumstances therefore the wharfinger has no right to set up any lien against him for the general balance of accounts due from *Wilson*.

ROOKE J. I am of the same opinion. I do not think that there is any occasion in this case to enter into the question respect-

(*a*) See *Smith* v. *Field*, 5 *T. R.* 402.

1802.

RICHARDSON v. GOSS.

ing the stoppage *in transitu*. The only question is, Whether the contract was rescinded before the goods got into the possession of the Defendant. *Wilson* the bankrupt acted with great propriety and honesty in writing to the Plaintiff to say that he would not accept the goods: and according to the case of *Atkin* v. *Barwick*, which decision has at different times been confirmed, he had a right so to do. Immediately on the receipt of *Wilson*'s letter the Plaintiff left *Newcastle*, and on his arrival in *London* considered the contract as rescinded. In *Neate* v. *Ball*, Lord *Kenyon*, speaking of the case of *Atkin* v. *Barwick*, says, "The trader finding himself in a failing condition very honestly did not accept the goods but returned them, and if the goods were not accepted the judgment was right." So in this case *Wilson* refused to receive the goods. As between the parties to the contract therefore the contract was rescinded. Then who objects? It is a person who claims under *Wilson*. But the Plaintiff's title to the goods is paramount to the title of any person who claims under *Wilson*. The doctrine of general liens is referable to special agreement, as was observed in *Oppenheim* v. *Russell* (a); and I think that doctrine is not to be favoured, because all persons who claim under them must have been guilty of neglect in suffering goods, upon which the law had given them a special lien, to go out of their hands without endeavouring to indemnify themselves by setting up a claim for a general lien. I shall never unless bound by authority assent to the doctrine that these general liens are to affect the rights of third persons, not claiming under those from whom the right to the lien is derived. The Defendant claims under *Wilson*, and had no more than a bare authority from him to receive the goods, which authority was dated in *May*, when there was no suspicion that *Wilson* was likely to be involved. And though he afterwards forgot to countermand this authority, when he had rescinded his contract with the Plaintiff, yet the Defendant had nothing more than a bare authority to receive the goods. I am therefore of opinion that he had no right to set up this general lien against the right paramount of the Plaintiff.

CHAMBRE J. If there be any case in which it would be justifiable to strain the law for the purpose of supporting a lien, yet I do not think that there is any reason for doing so in this: for if this defence be sustained the effect will be, that we shall direct

(a) *Ante*, p. 42.

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the debts of one man to be paid by the effects of another. Two questions have been made. First, Whether the *transitus* were at an end? And if it were necessary to decide that, I should strongly incline to think that if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and dispose of them there, that the journey would be at an end when the goods arrived at such warehouse. The second question, Whether the contract were rescinded? is the principal question to be considered. It may be observed that the case of *Atkin* v. *Barwick* has stood very near a century; and though it has been much commented upon, yet its authority in the main has been preserved. It is true that there are some very peculiar circumstances in that case. Seventeen days intervened after the goods had been sent out of the possession of the consignees before any notice was given to the consignors of their intention not to accept them; and it does not appear that the person to whom they were sent had any connection with the consignors: perhaps therefore if a case precisely similar to *Atkin* v. *Barwick* were now to arise it would not receive the same decision. Since the time when that decision took place a new distinction has arisen respecting preference given to one creditor over the rest in contemplation of bankruptcy: and perhaps that distinction would have been sufficient to set aside the transaction in that case. But the objections do not rest here. For when advice was given to the consignor that the consignees had sent away the goods the bankruptcy had taken place. Under these circumstances it might be difficult now to support the case as it was then decided: and it is remarkable that when this case has been mentioned upon various occasions, it has constantly been found fault with, and yet the Judges have never particularly stated the parts with which they quarrelled, but have always confirmed the case upon the whole, and holden the decision to have been right. One main point was this, that the Court would presume an assent on the part of the consignors: and in that case it was necessary that they should do so, for the consignors had no opportunity of expressing their assent until 19 days after the goods were sent away, and two days after the act of bankruptcy had taken place. In the present case *Wilson* never received the goods: and indeed some days before they came to the hands of the wharfinger he wrote a letter to the consignor signifying his intention not to receive them, which letter was received by the consignor the day before the goods arrived at

 the

1802.
RICHARDSON v. GOSS.

the wharf. If an actual assent were necessary, the Plaintiff's answer to that letter seems to me to amount to an assent. It is true he reserved to himself a power of judging of the conduct of *Wilson*: but he immediately set out for *London* and on his arrival there demanded the goods; and if an actual assent could not be presumed, I think that would be evidence that an assent was given. Indeed the terms of *Wilson*'s letter were so strong that it was hardly necessary for the Plaintiff to endeavour to stop the goods; for *Wilson*'s expression is that he shall not apply for them. I will not go over the other cases. It has been contended however that the transaction is a fraud on the wharfinger. But before fraud can be committed there must be some right. Now the wharfinger had a mere naked authority: and any disposition made by the person who gave such an authority must put an end to it. It has been argued that the wharfinger might have extended his credit to *Wilson* upon the assurance of the arrival of the goods: but that is a speculation which the law does not allow; for there can be no lien until possession. On the arrival of the goods the wharfinger is put to some trouble and expence for which he has a lien upon the proprietor of the goods: but the lien now claimed is an extension of that lien; and if he had had former dealings with *Richardson* he might have set up a general lien against him. The lien whether general or special must be against the proprietor, which in the present case was the Plaintiff.

Per Curiam, Rule discharged.

May 19th.

MACLEAN *v.* DOUGLASS.

The Court refused to set aside upon summary application a judgment entered up on a warrant of attorney given by a feme covert.

BAYLEY Serjt. moved for a rule to shew cause why the judgment in this case, which had been entered up by virtue of a warrant of attorney given by a feme covert, should not be set aside. He stated that the judgment had been entered up more than a year, but observed that as it might clearly be set aside upon a writ of error, the Court might perhaps grant relief in this stage of the proceedings in order to avoid putting the Defendant to unnecessary expence and delay.

But *The Court* refused to grant a rule: and CHAMBRE J. said, that he remembered a case in which he had moved the Court of *King's Bench* for leave to plead coverture in abatement, after the regular

1802.
MACLEAN v. DOUGLASS.

regular time for pleading in abatement had elapsed, stating that the matter which he applied for leave to plead would afford ground for a writ of error, and consequently that if the action were suffered to proceed, the judgment might be reversed; but the Court refused a rule to shew cause, and the judgment was afterwards reversed for error.

Bayley took nothing by his motion.

May 19th.

HOLFORD *v.* COPELAND.

The Masters in Chancery are not rateable as occupiers of their respective apartments in *Southampton Buildings* under the paving act 11 *Geo.* 3. c. 21.

TRESPASS for taking the Plaintiff's goods. Plea. Not guilty.

The cause was tried before Lord *Eldon* Ch. J. at the *Westminster* Sittings after *Hilary* Term 1801, when the jury found a special verdict which stated in substance as follows.

In pursuance of the 32 *Geo.* 3. *c.* 42. and before the making of the rate hereinafter mentioned, a sum of money not exceeding 300,000 *l.* belonging to the suitors of the Court of *Chancery* was invested in Government Securities under the direction of the said Court, and out of the interest certain sums not exceeding 30,000 *l.* were applied in purchasing ground, and in building and completing the offices and repositories hereinafter mentioned, and in paying other expences relating to the execution of the act. A proper piece of ground lying in *Saint Andrew Holborn* above the bars, with such houses and buildings as were then standing thereon, was purchased out of the said money, and by indentures of bargain and sale inrolled, conveyed to our sovereign Lord the King, his heirs and successors, for the purposes and in pursuance of the said act, whereby the King became seised thereof in fee in right of his crown for the purposes of the act: and out of the same money proper and convenient offices for the masters in ordinary in *Chancery* and their clerks, and for the secretaries of bankrupts and lunatics, and their clerks, and safe and secure repositories for the deeds, books, papers, and writings of and belonging to the suitors of the said Court, delivered or to be delivered to the said masters, and the records, proceedings, deeds, books, papers, and writings, delivered or to be delivered and left in the custody of the said secretaries of bankrupts and lunatics respectively, together with a public office for the suitors of the said Court, were built on the same piece of ground, and made fit for the reception of the said masters and

secretaries,

secretaries, and the transaction of their respective business therein, and for that purpose were furnished out of the same money with divers desks, writing tables, stools, chairs, and presses, fit and necessary for the transaction of such business, and for the custody and preservation of the said records, proceedings, deeds, books, papers, and writings. In the basement story of the said buildings, under the public office and door-way thereof there are three small rooms, which, until the 21st of *December* 1799 were occupied and inhabited by a man, (who had a wife and family residing also with him,) employed to watch and take care of the said building, and of the repositories of the deeds, papers, and writings therein belonging to the public suitors of the Court of *Chancery*, and paid a salary for such care and trouble by the said masters in ordinary, but from the day and year last aforesaid the said person and his family wholly ceased to inhabit the said rooms, and the same have been ever since wholly unoccupied. The said offices and repositories form altogether but one building under one roof, and with one public and general entrance and stair-case, and from the time of building thereof the same have been used for the purposes in the said act mentioned, and for no other purposes; and the said building, and also the ground whereon the same was erected, and also the desks, writing-tables, stools, chairs, and presses, (except the wooden chair in the declaration mentioned, which was the property of the Plaintiff,) are vested in the King for the uses aforesaid, and the King is the owner and proprietor thereof. The front of the said building, abutting on the street called *Southampton-Buildings*, is erected upon ground whereon two messuages, with their appurtenances, formerly stood, which messuages, with their appurtenances at the time when they were taken down were, and for some time had been rated under the act of Parliament hereafter mentioned at 3 *l.* 8 *s.* 9 *d.* The Plaintiff after the time of making the rate hereinafter mentioned, and thenceforth until and at the time when, &c. was one of the masters in ordinary in *Chancery* duly appointed, and as such, like the other masters, transacted the business of his office in one separate and distinct set of offices, consisting of three rooms in the said building, whereof one was used by himself, another by his senior clerk, and the third by the clerks or writers under such senior clerk. The Plaintiff did not, nor did his clerk or writers, at any time occupy the said offices, or dwell or inhabit therein otherwise than as hereinafter mentioned, that is

to say, that the Plaintiff did with his clerks and writers attend at his said office during the usual office hours, for the purpose of transacting the public business of his said office and for no other, and that the suitors of the said Court with their counsel and solicitors, had always during those hours free access to the said office, for the purpose of prosecuting and defending there their suits and causes pending in the said court of Chancery, and that the Plaintiff, and the other masters did in turn attend at the said public office in the day-time during the usual office hours, for the purpose of transacting there the public business of the said Court, by administering oaths and taking acknowledgments of deeds relating to causes pending in the same Court, according to the course and practice of the same Court, and for no other purpose, and that on the expiration of such office hours the Plaintiff and his clerk and writers left the said separate offices and public office, and locked up the same, and did not return thither until the return of such office hours as aforesaid, and the Plaintiff and his clerk and writers respectively have always had their several dwelling-houses or places where they and their families have respectively inhabited apart and at a distance from the said building, and neither the Plaintiff nor his clerk or writers, nor any person whatsoever, at the time of making the said rate, or from thence until or at the time when, *&c.* slept in the said offices or building, or in any manner inhabited, held, occupied and enjoyed the same or any part thereof, except in the execution of his said office, and according to the direction of the said act, and no other person had occupied any part of the said building except at the time and in the manner herein before mentioned. The said building, and all the several offices and repositories therein have always been repaired and insured against fire by order of the Court of *Chancery*, out of the money in the said act mentioned, according to the directions of the said act. On the second *Thursday* in *June* 1798, and before the time when, *&c.* the committee for the parish of *St. Andrew Holborn* above the bars, and the parish of *St. George* the Martyr, duly chosen according to the 11 *Geo.* 3. *c.* 22. made a rate upon all persons inhabiting, holding, using, occupying, possessing, or enjoying any land, ground, house, shop, wharf, warehouse, coach-house, stable, cellar, vault, building, tenement, or hereditament whatsoever, within *St. Andrew Holborn* above the bars and *St. George* the Martyr, (except such squares, streets, lanes, and places as had been paved under and by virtue of a certain optional clause

1802.

HOLFORD v. COPELAND.

in the same act mentioned,) for the necessary purposes of that act, and the other acts in that act mentioned, the said rate not being for new paving, and not exceeding one shilling in the pound in the same year, according to the proportion of the yearly rent or value directed by the said act; and also another rate for other purposes of the act upon all persons before mentioned, within such parts of the limits aforesaid as upon the day and year last aforesaid were paved by virtue of certain acts made in the 2d, 3d, 4th, 5th, and 6th years of the king, for empowering commissioners to pave, cleanse, and light the squares, streets, lanes, and other places within the city and liberty of *Westminster*, and other places in the said act mentioned, not exceeding sixpence in the pound in the same year, according to the proportion aforesaid; and in and by the said two several rates did rate and assess the Plaintiff as an inhabitant and occupier of one separate set of offices in the said building, and for and in respect thereof in the sum of 3 *l.* 2 *s.* 6 *d.* for the purposes last aforesaid. Of these rates and assessments due notice was given to the Plaintiff, and the sum of 3*l.* 2*s.* 6*d.* legally demanded: payment of which being refused, the Defendant by virtue of a warrant of two magistrates, distrained the chair mentioned in the declaration then found and being in the separate and distinct set of offices occupied by the Plaintiff in the said building as aforesaid.

Heywood Serjt. for the Plaintiff. One fact stated in the special verdict may be laid out of the consideration of the Court, namely, that the buildings in question were erected upon the scite of two houses formerly rated. For it has been clearly settled by the cases of *Rex* v. *St. Luke's*, 2 *Burr.* 1053. *Rex* v. *St. Bartholomew's*, 4 *Burr.* 2435. *Rex* v. *Waldo*, *Cald.* 358. and Lord *Amherst* v. Lord *Somers*, 2 *T. R.* 372. that the rateability of property depends upon the manner in which it is used, and that if no person can be found to answer the description of the act imposing the rate the property cannot be rated: in the former of those cases Lord *Mansfield* says, "As to the argument that a proprietor of lands or houses cannot by his own voluntary act discharge such his property from payments legally due to other persons upon and out of it, it does not hold true in fact; for this rate payable to the parish, as well as several other payments arising from property and chargeable upon it, do and must depend upon the will of the proprietor. The owner of a house may, if he please, pull it quite down, and convert it into a toft." The main question is, whether the buildings which have been rated are to be considered as public buildings?

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For if these be public buildings the Plaintiff is not rateable, it having been provided by the 11 *Geo.* 3. *c.* 22. *s.* 38. that all assessments in respect of public buildings shall be made upon the proprietor, not on the inhabitant or occupier. In this case it is found that the king is the proprietor. It is not necessary to argue whether the King be rateable or not, for if the Plaintiff be not it is sufficient for this case. But independent of the general rule that the King cannot be charged unless personally named, it is clear from the clause of distress, *s.* 39. which authorizes the collectors to levy on the goods of the parties, whether found upon the premises or elsewhere, that the provisions of the act could not have been intended to apply to the King. Nor is there any hardship in this; for by *s.* 17. it is provided that the commissioners shall not be bound to pave in front of any building belonging to his Majesty. When it is considered that these buildings have been erected out of a public fund, and appropriated solely to public purposes, it can hardly be contended that they are not public buildings. Nor will it make any difference that a part of the building is denominated the public office, and used for the general business of all the suitors, whereas the apartments in question are appropriated to the use of the plaintiff only. For business transacted by the Plaintiff in those apartments is public business only relating to the suitors of the court. If indeed he had used them for his private convenience, and had derived a beneficial occupation from them, he would have been liable. This distinction is recognized in many cases which have arisen upon the poor laws. *Rex* v. *Matthews*, *Cald.* 1. *Robson* v. *Hyde*, *Cald.* 310. *Rex* v. *Eyles*, *Const's Bott*, 169. *Lord Bute* v. *Grindall*, 1 *T. R.* 338. *Rex* v. *Hurdis*, 3 *T. R.* 497. *Rex* v. *Woodward*, 5 *T. R.* 79. *Rex* v. *Catt*, 6 *T. R.* 332. And though it be stated that a person was employed to watch and take care of the building, yet that will not alter the case if he were only employed for the purpose of carrying the object of the establishment into effect. This appears from the case of *Rex* v. *Field*, 5 *T. R.* 587. where it was held that a woman who occupied apartments in the buildings of the Philanthropic Society, for the purpose of superintending the children, was not rateable in respect of those buildings. The present question is decided by the case of *Eckersall* v. *Briggs*, 4 *T. R.* 6. which arose upon another paving act, 10 *Geo.* 3. *c.* 23. and where Lord *Kenyon* says, "The question then is, what is meant by public buildings? and that may be answered by saying, that those are public which are applied to pub-

1862.

HOLFORD v. COPELAND.

lic purposes." With respect to a case which may be relied upon, where the present Plaintiff was assessed to the duties on inhabited houses, for chambers rented by him in *Symond's* Inn, for the purposes of carrying on the business of his office, and that rate was confirmed by the Judges, it may be observed, that where a person rents chambers for the purpose of doing his public duty, instead of doing it at his own house, he does so for his own convenience: which differs materially from transacting business in a place appointed for that purpose by the public. Another case will probably be urged as an authority, where a rate upon these very apartments, together with the public office, was confirmed by the Judges. As to which it may be sufficient to say, that decisions of this sort being made without argument, cannot be put in opposition to the determinations of the ordinary Courts.

Praed Serjt. for the Defendant. The argument on the other side tends to shew that the property in question is not liable to be rated at all. But it appears to have been the manifest intention of the act, that all property should be rated in some hands or other. And Mr. J. *Ashhurst* in *Eckersall* v. *Briggs*, speaking of a similar case, says, "It clearly was the intention of the Legislature, when this act of Parliament was framed, that no real property within this district should be exempt from the rates imposed by it. The property must be charged to some person or other." In the discussion of this case the authorities upon the poor laws may be laid aside. For in all those cases the questions turned upon the sufficiency of the occupation of the party rated. But here the question is, whether the Plaintiff do not fall within some of the words of this particular act of Parliament, which are, "Persons who do or shall inhabit, hold, use, occupy, possess, or enjoy any land," &c. The act itself appears to have made a distinction between the apartments appropriated to each master and the public office of the suitors; the latter being expressly denominated *public*, which the former are not: a circumstance which cannot be considered immaterial in an act of Parliament, in which the distinction between private and public buildings was contemplated and expressly provided for. Although no decisions upon this particular act are to be found in the courts of *Westminster-Hall*, there are two cases which have been decided before the Judges, which must be considered as high judicial authorities upon the subject. The present Plaintiff, in the year 1779, having been assessed to the inhabited house tax for chambers rented by him in *Symond's*

Inn,

1802.

HOLFORD v. COPELAND.

Inn, for the purpose of transacting the business of his office, the assessment was confirmed by the Judges (a). Now it is found in the present case that the Plaintiff kept the key of the apartments: he might have used them as he thought proper; and even if they are to be considered as public buildings there was a private occupation. They were in all respects used as the chambers in *Symmond's Inn*; and if the former were rateable as an inhabited house, these apartments must also be considered as having been inhabited by the Plaintiff. The other case (a) arose upon this very act of Parliament, respecting these very apartments, together with the others in the same buildings, and is therefore to be considered as an express authority upon the point. The result of the inquiries which the Court desired to be made is, that the Six Clerks', Register's,

(a) At a Meeting of the Commissioners of the Land Tax, acting for the liberty of the Rolls, in the county of *Middlesex*, at the Six Clerks Hall in *Chancery-lane*, on 5th *February* 1779.

Peter Holford Esq. one of the Masters in the High Court of Chancery, rents chambers in a place called *Symond's Inn* in *Chancery-lane*, merely for the purpose of carrying on the business of his office, for depositing the deeds and writings left with him; and no person lodges or visituals in such chambers, nor are the same used for any other purpose than as aforesaid; and therefore the said Mr. *Holford* does not apprehend the same to come within the meaning of the act of parliament for granting to "His Majesty certain duties upon all inhabited houses within the kingdom of *Great Britain*." We are of opinion the said chambers ought not to be assessed to the house tax, and have allowed the appeal.

Mr. *R. Golden*, the Surveyor for the Crown, being present and dissatisfied with our determination, requested the case to be stated specially, which we have hereby done, and humbly submit the same for your Lordships' opinion thereon. Given under our hands the day and year above written.

N. Mitford.
Christian Zincke.
John Dickins.
Benjamin Green.
S M. Leake.

18th *Nov.* 1779. We are of opinion that the determination of the Commissioners is wrong.

J. SKYNNER.
H. GOULD.
E. WILLES.
W. BLACKSTONE.
W. H. ASHHURST.
G. NARES.
JA. EYRE.
B. HOTHAM.
R. PERRYN.

(a) At a meeting of the commissioners for hearing and determining appeals against the duties on windows and inhabited houses, held at the *White Hart* Tavern in *Holborn*, on the 28th day of *March* 1797, Mr. *Carr* on behalf of the Masters in Chancery appealed against the assessments made on the window and house duty for certain offices in a building lately erected in *Southampton Buildings*, *Chancery lane*, in respect of which duties the offices made use of by each of the Masters had been made the subject of separate and distinct assessments; and they had accordingly been called on for payment of the duties assessed on their different offices, besides which the Masters had been called on jointly for payment of the duties assessed on other parts of the buildings, consisting of the Public Office, the Public Sale Room, the Porter's Apartment, and the general stair-case. The said Mr. *Carr*

1802. HOLFORD v. COPELAND.

ter's, and Accountant General's offices are rated by the pound rate upon the occupiers; though by agreement the Benchers of *Lincoln's-Inn* pay the amount. The Ordnance office, two Secretaries

Carr alleged that the buildings in question were erected in pursuance of an act of parliament passed in the 32d year of his present Majesty's reign, intitled "An act to improve the High Court of Chancery, to "lay out a further sum of the suitors' money upon proper securities, and for applying the interest towards discharging "the expences of the office of the Accountant-General and for building offices for "the Masters in ordinary in Chancery, and "a public office for the suitors of the said "Court, and offices for the secretaries of "bankrupts and lunatics, and building "repositories for securing the title-deeds "of the suitors of the said Court, the records and proceedings of the Commissioners of Bankrupts and Lunatics;" and that such buildings were made use of by the Masters for the purpose of transacting the business peculiar to their offices, but that the same were not inhabited or used except at office hours, except by a porter who had a separate apartment in the same building to take care of the same, where it was admitted that the porter with his wife and family ate, drank, and slept, and consequently resided and was paid by the said Masters proportionably. The said Mr. *Carr* further alleged that by the 4th section of the said act the said buildings were declared to be vested in his Majesty, his heirs and successors, and therefore he contended, on the part of the Masters, that the said buildings were not liable to be rated to the house and window duty.

Mr. *Golden* the Surveyor, on the part of the Crown, contended, that the buildings ought to be considered as so many different apartments inhabited and used by the different Masters in Chancery, and that it had been admitted that a porter with his wife and family constantly resided in the said buildings, having a separate apartment therein, in which they ate, drank, and slept, and that he has the charge of the whole building, and is paid by the said Masters proportionably. That with respect to the act of parliament which vested the buildings in his Majesty, the Surveyor contended, that circumstance did not exempt the Masters from taxation, because the exemptions under the several acts of parliament in favour of the King and Royal Family are confined to palaces and houses in which his Majesty and the Royal Family actually reside.

We the Commissioners, whose names are hereunto subscribed, being present, and having heard and considered what was alleged on the part of the Crown, as well as on the part of the Masters in Chancery, have thought fit to allow the assessment and disallow the appeal. With which determination Mr. *Carr*, on the part of the Masters, being dissatisfied, hath required a case to be stated by us for the opinion of one or more of the Judges of the Court of King's Bench or Common Pleas, or the Barons of the Court of Exchequer; which we have hereby done accordingly. Witness our hands this day.

Thos. Collins.
W. Blamire.
W. Blasson.

Holborn Division, 8th *June* 1798.

This case having been referred back to the Commissioners (by order of the Judges) for them to state whether the person who has the care of the building is to be considered as a porter or watchman? and they having examined *Francis Norman* (the said person in question) upon oath, hereby state the result of the said examination, which they submit accordingly for the opinion of the Judges as aforesaid.

He deposes, that his business is to take care of the building, to trim and light the lamps, to sweep and clean the passages, stair case, sale-room, the public office, and the Masters' sitting room; that the Masters have laundresses whom they employ and pay to keep their respective offices clean; that he, his wife, and family, eat, drink, and sleep in an apartment of the said building; that he does not sit up to watch, but after seeing that the doors are properly fastened

1802.

HOLFORD v. COPELAND.

taries of State's offices and the Transport office, are rated in the same manner, having been paved under the 11 *Geo.* 3. *c.* 22. The Treasury, Horse-Guards, Admiralty, White-Hall, and Signet, being situated in Broadway, which was paved at the expence of Government, are not rated. *Buckingham-House*, which is settled on the queen, is rated. The offices in *Somerset-House* (the scite of an old palace) pay to the inhabited house tax, but the area having been paved by Government, they are not rated to the paving rate. *Cur. adv. vult.*

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. The single question in this case is, Whether this rate has been duly imposed according to the provisions of 11 *Geo.* 3. *c.* 22.? The material words on which this question arises are these, that the Commissioners "shall make one or more rate or rates, assessment or assessments upon all and every person and persons who do or shall inhabit, hold, use, occupy, possess or enjoy any land, ground, house, shop, wharf, warehouse, coach-house, stable, cellar, vault, building, tenement, or hereditament whatsoever, which assessment is to be made by a pound rate." This therefore is a general assessment upon all persons who shall inhabit, hold, use, occupy, possess or enjoy any land or ground of any description whatsoever, and if this clause had stood alone the case would clearly have depended upon the same sort of question which has often arisen on the poor rates, Whether the Masters in Chancery were to be considered as inhabitants or occupiers? But as it was intended that all property however occupied should be rated for the paving, the Legislature has provided in what manner certain buildings should be rated, reciting that "forasmuch as it is reasonable that all public buildings, dead walls, and void spaces of ground, should be rated and assessed for the purposes of the act," it enacts that the Commissioners may "rate and assess all parish churches, church yards, chapels, meeting houses, schools, inns of court and chancery, halls, societies, markets, warehouses, wharfs, void spaces of ground, and all other spaces of ground whatsoever,

fastened and that every thing is safe, he goes to bed. For these services he is paid forty guineas a-year out of the general fund belonging to the Masters.

[illegible]
W. Hawkesworth
R. Galds[illegible]

19th *June* 1798. We are of opinion that the determination of the Commissioners is right.

JAS. EYRE.
AR. MACDONALD.
B. HOTHAM.
A. THOMPSON.
G. ROOKE.

1802.

HOLFORD v. COPELAND.

at a rate not exceeding 6*d.* in any one year for every square yard of pavement:" which rate is directed to be paid in respect of churches and chapels and church yards, by the church or chapel wardens; and upon the other property, by the owners and proprietors thereof. The first of these clauses therefore charges the occupiers of the lands therein mentioned at a pound rate, and the second charges the proprietors of public buildings by the square yard of paving. The only difference between this and the *Mary le Bone* act, which passed in the year preceding and on which the case of *Eckersall* v. *Briggs* arose, is, that in that act where the yearly income of public buildings could be ascertained they were to be rated by a pound rate; whereas in this case, all public buildings are to be assessed by the square yard of pavement. With respect however to the distinction between public and private buildings, there can be but one construction of both acts; and Lord *Kenyon* in the case of *Eckersall* v. *Briggs* thought the line of distinction very plain, *viz.* that where a building is applied to public purposes, it is a public building. The question therefore will be, Whether according to the true construction of the act, these apartments for which the Masters have been rated are to be deemed public buildings? These apartments are situated in a building which was erected by virtue of an act of parliament passed in the thirty-second year of the King; which directed that a sum of money belonging to the suitors of the Court of Chancery should be laid out in Government securities and the interest of the money applied under the order of the Lord Chancellor towards building and completing proper and convenient offices for the Masters in Chancery and their clerks, and the secretaries of bankrupts and lunatics and their clerks, and safe and secure repositories for the deeds, books, papers and writings belonging to the suitors of the Court, and delivered to the Masters in Chancery, and the records, proceedings, &c. delivered to the secretaries of bankrupts and lunatics, together with a public office for the suitors of the Court of Chancery in the stead or place of the then public office for the reception of the said Masters and secretaries and the transaction of their respective business therein: and the act further provides that the ground and buildings thereon shall be vested in his Majesty, his heirs and successors, for the purposes of the act. The special verdict states that in pursuance of this act a building with proper offices has been erected for the reception of the Masters and the transaction of their respective business therein, and that

 they

1802.

HOLFORD *v.* COPELAND.

they have hitherto been used for the purposes of the act and for no other purposes whatever. It is indeed stated that up to a certain period a person, employed to watch and take care of the building and papers and who was paid by the Masters, lodged in three small rooms in the basement story. It was certainly very proper that such a person should be so employed, and I cannot think that this circumstance can make any difference in the case: and I hope that the Masters in Chancery will not be afraid to take him back again, though possibly it may be safer that he should not bring his wife and family with him. If then these apartments are to be considered as public buildings the rate has been improperly made, since it has been made by a pound rate on the occupiers; whereas it should have been made, if at all, on the owner and by the square yard. In the present case however the owner is the King: and if it were necessary to shew that the King is not rateable in a case where he is not expressly named, I might refer to a clause in the paving act (*a*) which exempts buildings belonging to his Majesty from the jurisdiction of the Commissioners. But it has been argued that although this may have been erected as a public building, and vested in the King, yet that there are many cases in which property belonging to the King when occupied by a subject has been held rateable: and I readily admit that if it could have been shewn that these apartments had been perverted to any private use, or that any beneficial occupation or enjoyment had been derived from them, they would have fallen within the cases which have been decided upon the poor rates in this respect, and would have been rateable. My Brother *Praed* felt how much the decisions upon the poor rates pressed upon him; and therefore endeavoured to lay them altogether out of the case: but they appear to me, to bear strongly upon the subject. The words of the statute of *Elizabeth* are "inhabitant and occupier." The cases therefore upon the poor rates are authorities to shew that persons who are only employed in the business of their public stations, are not within the meaning of the Legislature "inhabitants and occupiers." In the case of The King v. *St. Luke's*, 2 *Burr.* 1063. it was urged in argument that the ground upon which the hospital was built had been formerly covered with buildings which had been very productive

(*a*) 11 *Geo.* 3. *c.* 22. *s.* 17.

1802. HOLFORD v. COPELAND.

to the poor rate, and that it was unjust that the hospital which was built upon the same ground should be exempted: but Lord *Mansfield* answered that the rateability of property must depend upon the use to which the owner thinks proper to apply it, and that as no occupier of the building within the meaning of the act was to be found, the building could not be rated. The same rule prevailed in The King v. *St. Bartholomew's*, and The King v. *Waldo*; for the occupiers made no profit of the buildings: and yet in the latter case, there was a woman resident in the house who made it as much her private habitation as the porter in the present case; except indeed that she had no family. So in The King v. *Woodward*, the trustees of a meeting house who made no profit of it were holden not to be rateable; though in *Robson* v. *Hyde*, the owner of a chapel who made a profit of the pews was holden rateable. Upon the same principle in The King v. *Hurdis*, a master gunner who occupied a battery house at *Seaford* belonging to the Crown was held rateable because he occupied it as his domestic house for his own convenience: and the same rule was applied to the cases of the Duke of *Portland* (*a*), and of Lord *Bute* (*b*); the former having been the grantee of the scite of a royal palace, and the latter ranger of a royal park. In Lord *Amherst* v. Lord *Somers*, where stables were occupied by a regiment of which Lord *Amherst* was Colonel, he was holden not to be rateable: but it was stated in the case that his own horses did not stand there, in order to shew that he had no beneficial occupation. In The King v. *Susannah Field*, the Court said that the woman who lived in the buildings belonging to the Philanthropic Society for the purpose of superintending the children, was not rateable in respect of those buildings: and Lord *Kenyon* compared her situation to that of a coachman sleeping over the stables of his master. And on the other hand, in The King v. *Catt*, the master of a charity school who resided in the school house was thought to be rateable, because he used the house for his own domestic convenience. If therefore according to these authorities a person inhabiting a public building, but not occupying it for his own domestic convenience, is not to be considered as an occupier within the meaning of the statute of *Elizabeth*, neither can he be considered as an occupier within the meaning of the paving act. Besides these authorities upon the poor rates, there is a case which arose upon a paving

(*a*) *Duke of Portland's case*, 1 *Const's Bott.* 122, ed. 4.

(*b*) *Lord Bute* v. *Grindall*, 1 *T. R.* 338. 2 *H. Bl.* 265.

paving act, and to which I cannot find an anſwer. This is the caſe of *Eckerſall* v. *Briggs*, in which it was contended that Lord *Lothian* was rateable as the occupier of certain ſtables rented by him as Colonel for the uſe of a troop of horſe: but the Court was of opinion that as he occupied them for public purpoſes, the rate ought not to be made upon him but upon the owner; the act having made the owner of public buildings rateable in the ſame manner as the preſent, with this immaterial difference only that according to that act if the rent could be aſcertained the rate was to be impoſed upon the owner by a pound rate, whereas according to the preſent the owner is in all caſes to be aſſeſſed by the ſquare yard of paving. Lord *Kenyon* in that caſe ſays, "The queſtion is what is meant by public buildings? And that may be anſwered by ſaying, that thoſe are public which are applied to public purpoſes." On theſe authorities the Court has been of opinion that ſuch an occupation as is ſtated in this ſpecial verdict is an occupation for public purpoſes, and that the apartments in queſtion are to be conſidered as public buildings within the meaning of the act. It is ſaid however that unleſs the Maſters be rated, there will be no one upon whom the rate can be made, the King being the owner: but that circumſtance cannot vary the queſtion reſpecting the occupation of the Maſters: and the opinion of Lord *Manſfield* in The King v. *St. Luke's Hoſpital*, ſhews that if no perſon can be found to anſwer the deſcription in the ſtatute, no rate can be made. In addition to this objection great reliance has been placed on a determination of the Judges upon an appeal by the Maſters againſt an aſſeſſment under another act of Parliament. But although this determination be certainly entitled to great attention, yet caſes of this deſcription never can be conſidered of equal weight and authority with the deciſions which are made by the Judges when ſitting in their ordinary tribunals; where arguments on both ſides are fully heard, and from which deciſions appeal may be made to the ſuperior courts. From the great number of caſes upon taxes which are brought before the Judges, their determinations are neceſſarily made in a greater haſte, and with ſomething leſs ſolemn attention than the caſes which ariſe in their own courts. We cannot therefore think this determination entitled to ſufficient weight to oppoſe the authority of the deciſions of the Court of King's Bench upon poor rates, and the conſtruction which has been put upon a former paving act by this Court in the caſe of *Eckerſall* v. *Briggs*. It will

1802.
HOLFORD
v.
COPELAND.

not be neceſſary to comment particularly upon the caſe itſelf, eſpecially as it aroſe upon a different act of parliament from that now under conſideration, though ſome obſervations might be ſuggeſted to take away ſomething from the weight of that determination. It appears that the Maſters were aſſeſſed individually for their reſpective apartments, and collectively for the public office. On the appeal, the Judges ſeem at firſt to have entertained ſome doubts; and to have thought that the caſe in a great meaſure turned upon the character and ſituation of the man who lived in the building, and deſired further information upon this ſubject. Upon the caſe being reſtated it appeared, that the buſineſs of this man was to take care of the building, and ſweep it, for which he was paid a ſalary out of the general fund of the Maſters; that his family reſided with him in the baſement ſtory, and that the Maſters had laundreſſes to take care of their reſpective apartments. I can hardly think that theſe circumſtances could make any very material difference in the caſe: and it is difficult to conceive how the reſidence of a porter who had the care of the whole building could make each Maſter rateable for his own apartment. The public have erected a building in which the Maſters are ordered to tranſact their buſineſs: they have no option. Can this ſubject them to be taxed for ſuch a building, as if it were occupied by them for private purpoſes, and according to the value of a building ſo occupied? It is ſaid that the Maſters are at liberty to occupy their reſpective apartments in any manner which may ſuit their own convenience. But the Lord Chancellor has never given them authority ſo to do; nor do I think that he would permit it to be done: and it is ſufficient in this caſe to ſay that the apartments never have been ſo occupied. If theſe apartments be rateable, the Judges' rooms behind *Weſtminſter Hall*, or any apartments which are uſed ſolely for public buſineſs, may be rated. If indeed public apartments be occupied for domeſtic purpoſes, they ſhould be rated: but if nothing but public buſineſs be tranſacted there, they ought not. Yet if a public officer think proper to hire chambers for the purpoſe of tranſacting his buſineſs there rather than at his own houſe, this is for his own convenience, and he ought to be rated for them. And when the Maſters in Chancery hired chambers in *Symmond's Inn* for the purpoſe of tranſacting their public buſineſs there, they were rated. The inquiries which have been made by the deſire of the Court have not proved very ſatisfactory. It is ſaid that the Six Clerks' Office and the Re-

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1802.

HOLFORD v. COPELAND.

gister Office are rated by the pound rate, and that the Society of *Lincoln*'s have thought fit to pay that rate. If that be so, the Society have certainly paid that rate in their own wrong: for if they were rateable they must have been rateable as owners, in which case they would not be liable to be assessed by the pound rate, but by the square yard. With respect to the public offices, some pay, some do not: where the owner lets them to be used as public offices he is rated to the paving tax. Thus if a house be hired for transacting the business of the Secretary of State, though the house be not rateable as a private house, the owner remains liable. The only question in the present case being, whether the apartments in question are to be considered as public buildings within the meaning of the act, we are of opinion that as they have only been used for public business, they are to be so considered, and that therefore judgment ought to be given for the Plaintiff.

Per Curiam, Judgment for the Plaintiff.

BUCHER and Another v. JARRATT.

May 22d.

In trover for the certificate of a ship's registry, the certificate may be proved by the production of the registry from which it was copied; though no notice has been given to produce the certificate itself.

TROVER for "a certificate in writing of the registry of a certain ship or vessel called the *Salem*, which said ship or vessel had been registered by the Plaintiffs, according to the statute in that case made and provided."

At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Hilary* Term, it appeared that the Defendant having been employed as broker in the sale of the ship *Salem* by the Plaintiffs had got the certificate of registry in question into his hands, and refused to deliver it at their desire to the person who had purchased of them, so as to enable him to obtain a fresh certificate of registry. To prove that such a certificate had been granted, an officer of the customs was called, who produced the original registry from which the certificate was copied. This evidence was objected to on the part of the Defendant, because no notice had been given to the Defendant to produce the certificate of registry itself, without which it was insisted that the Plaintiffs could not resort to any secondary evidence of the instrument which they sought to recover. Lord *Alvanley* admitted the evidence, and a verdict was found for the Plaintiffs.

 A rule

1802.
BUCHER
v.
JARRATT.

A rule *nisi* for a new trial was obtained on a former day, on the ground of the evidence having been improperly admitted, and the case of *Cowan* v. *Abrahams*, 1 *Esp. N. P. Cas.* 50. was then cited, where Lord *Kenyon* in an action of trover for a bill of exchange, refused to admit any evidence respecting the bill, notice not having been given to the Defendants to produce the bill itself.

Shepherd Serjt. now shewed cause. The rule adopted by Lord *Kenyon* in *Cowan* v. *Abrahams* does not apply in the present case, for there it was necessary that the bill itself should be produced, in order to see whether any part of it had been paid off, since the damages were to be estimated by the contents of the instrument, whereas here the jury need not inspect the certificate of registry, in order to estimate the damage the plaintiffs have sustained by the detention of the certificate. Besides many bills of exchange of the same purport may be drawn by the same person, whereas there can be but one certificate of registry of the same ship existing at any one period of time, for no new certificate is granted till the old one is brought in. It was only necessary to prove that such a certificate had been granted to the Plaintiffs, and that the Defendant had tortiously converted it to his own use. Is it to be contended that if trover be brought for a valuable book, no evidence can be received of the value of the book unless a notice has been given to produce the book? And yet in the question of damages much may depend upon the edition of the book, which will be better proved by production of the book than by any other means. If the rule adopted in *Cowan* v. *Abrahams* be extended in the way now contended for, no line can be drawn to prevent its being also extended to every case where a specific thing is sought to be recovered in trover.

Best Serjt. *contrà*. "In *Cowan* v. *Abrahams* Lord *Kenyon* observed, that the objection to the evidence offered was founded on a rule of law not to be departed from, namely, that the best evidence the nature of the case admits of is always to be given; that wherever there is written evidence, parol evidence of its contents is not the best evidence, and is therefore inadmissible." So in a case similar to that before Lord *Kenyon*, the same rule was laid down by the late Lord Ch. J. *Eyre*. In the latter case the parties acquiesced in the opinion of the Chief Justice delivered at *Nisi Prius*, but it is observable that in the report of *Cowan* v. *Abrahams* the point is stated to have been moved in the court of *King's Bench*,

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and the opinion of Lord *Kenyon* to have been confirmed by the other Judges. The argument adduced from the supposed absurdity of giving notice to produce a book or other specific thing sued for in trover, has no weight whatever in this case; for there the rule of law that of written instruments the best evidence must be given unless where a notice to produce the instrument itself has failed of success, does not apply, books not being written instruments. That rule is founded on the fallibility of the human memory, and so far is it carried, that in an indictment for stealing a written instrument it has been said to be necessary to give notice to the prisoner to produce the instrument before any evidence can be received of its contents. [*The Court* however observed that such was certainly not the practice, and intimated that it had been held unnecessary (*a*); and *Heath* J. said, that in a case tried before himself at *Worcester*, a man having been indicted for stealing a 5 *l.* note from a person who did not recollect the tenor of the note, the indictment charged him generally with stealing a 5 *l.* note, without adding any further description of the note, and the point being reserved for the opinion of the Judges, they held the indictment sufficient.]

Lord ALVANLEY Ch. J. Without controverting the rule laid down by Lord *Kenyon*, I think this case very distinguishable from *Cowan* v. *Abrahams*. None of the arguments used by his Lordship in that case apply to the present. There the best evidence of the contents of the bill of exchange was unquestionably to be derived from the production of the bill itself. But the production of the certificate of registry could in this case have answered no purpose whatever, the only question being, Whether the Defendant wrongfully detained the certificate from the Plaintiffs or not? It seems to me therefore no violation of the rules of evidence to admit proof of the existence of the certificate, in order to charge the Defendant with a tortious conversion of that instrument.

HEATH J. There is a material difference between an action of *assumpsit* on a promise contained in an instrument in writing and an action of trover for the instrument itself. In the former the promise must be proved as laid, and consequently can be best proved by inspection of the instrument; in the latter the gift

(*a*) In *The King* v. *Aickles*, 1 *Leach. Cro. Ca.* 330. ed. 3. which was an indictment for stealing a bill of exchange, parol evidence of the bill was received, though no notice to produce it had been given either to the prisoner or his attorney.

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1802. BUCHER v. JARRATT.

of the action is the tort. Undoubtedly if a party unnecessarily take upon himself to describe the instrument he must prove his description. But that is not the case here. In fact the original was produced, and that which the Defendant insists ought to have been produced was only a copy.

ROOKE J. This action is brought to recover from the Defendant the property in a specific thing; and therefore I think the evidence received at the trial was properly received. Where a written instrument is to be used as a medium of proof by which a claim to a demand arising out of the instrument is to be supported, there I admit the instrument itself must be produced, or notice to produce it must have been given to the Defendant before any evidence of its contents can be received. But this being an action of trover for the certificate of registry itself, I can see no sound reason why evidence should not be admitted of the existence of the certificate in the same manner as evidence of a picture or other specific thing is constantly admitted where it is sought to be recovered in the same form of action. It is true that if a party take upon himself to describe the contents of the instrument, he must prove it as he describes it. In this case it was not possible for the Defendant to entertain a doubt what was the thing demanded, there being but one certificate of registry to a ship existing at any one period. The original registry, which is a kind of duplicate of the certificate, was produced; and the certificate itself being in the possession of the Defendant, it was in his power to produce it and shew that the Plaintiff's evidence respecting the certificate was not correct, if that had been the case.

CHAMBRE J. There is an essential difference, as I conceive, between the mode of proving a very general or a very minute description of a written instrument. The rule undoubtedly is, that no evidence can be received of the contents of a written instrument but the instrument itself. But in this case the Plaintiffs declared in trover for a written instrument describing it generally, and not referring to its contents, of which evidence could not have been received, as no notice had been given to the Defendant to produce the instrument itself. I think therefore the evidence was properly admitted.

Rule discharged.

PIGOTT *v.* THOMPSON.

May 24th.

A. agreed in writing to pay the rent of certain tolls, which he had hired, "to the treasurer of the Commissioners;" held that no action for the rent could be maintained in the name of the treasurer.

THIS was an action of *assumpsit* tried at the last assizes for *Cambridgeshire* before Mr. Justice *Grose*, when a verdict was found for the Plaintiff with 63 *l.* 7 *s.* 6 *d.* damages, subject to the opinion of the Court on the following case.

"By three acts of Parliament of the 33 *Geo.* 2. the 13 *Geo.* 3. and the 37 *Geo.* 3. certain persons by name, and all persons qualified as the said acts direct, were appointed commissioners for draining certain fen lands in the isle of *Ely* in the county of *Cambridge*, called *Burnt Fen first District*, and by the provisions of the said acts the commissioners are empowered to erect certain toll-gates, and take and receive certain tolls in the said fen lands, and the tolls are vested in the commissioners and their successors. On the 23d *June* 1798 the commissioners let the said tolls to the Defendant for three years, who thereupon signed a certain paper to the following purport:

"*June* 23d 1798. Now to be let the several tolls of *Burnt Fen first District*, with the toll-house.

June 23d 1798. "I do hereby acknowledge to have hired the "above tolls for three years by private contract, at one hundred "and forty-five pounds *per annum*, to be paid to the treasurer of "the commissioners at his house in *Ely*, by twelve equal monthly "payments in each year, the first payment to begin and be made "on the 24th day of *July* next, as witness my hand, *John* "*Thompson*."

The Plaintiff was on the said 23d *June* 1798, and still is treasurer to the said commissioners. The treasurer is the officer of the commissioners appointed under the act of Parliament with an annual salary. The Defendant immediately entered into the receipt of the tolls, and continued to hold and receive the same during the said three years, and during that time paid to the Plaintiff as treasurer several sums on account of the said rent, but the sum of 63 *l.* 7 *s.* 6 *d.* still remains due, to recover which this action is brought. The declaration contains special counts on the agreement of the 23d *June* 1798 and counts for money paid, money lent and advanced, money had and received, and on an account stated."

1802.

PIGOTT v. THOMPSON

The queſtion for the opinion of the Court was, Whether under the circumſtances the Plaintiff was entitled to recover? If he was, the verdict to ſtand, if not, a verdict to be entered for the Defendant.

Williams Serjt. for the Plaintiff. The queſtion is, Whether the treaſurer of the commiſſioners be entitled to maintain this action? which muſt depend upon this, Whether any contract were made with him by the Defendant? The Plaintiff was the agent of the commiſſioners, and the terms of agreement ſigned by the Defendant import, that in conſideration that the commiſſioners had let the tolls to him, he undertook to pay the rent to the Plaintiff, who was their agent. Such a conſideration is ſufficient to ſupport the promiſe; for if *A.* in conſideration of ſomething received from *B.* promiſe to pay to *C.* this is a good *aſſumpſit* to *C.* If there be a conſideration for the *aſſumpſit* it ceaſes to be *nudum pactum*, though that conſideration ariſe from a third perſon. *Gilbert* v. *Ruddeard*, *Dy.* 272.* in marg. *Diſborn* v. *Denabie*, 1 *Roll. Ab.* 31. If the perſon to whom the promiſe is made be authoriſed to give a diſcharge it is ſufficient. If, therefore, the Plaintiff be ſufficiently deſcribed in the agreement, he may well maintain this action. Now the caſe ſtates, that at the time when the agreement was entered into, he was treaſurer to the commiſſioners, and that he continued ſo when the action was brought, and though he be not mentioned by any other than his name of office, being deſcribed as treaſurer, yet the rule applies *id certum eſt, quod certum reddi poteſt.* The promiſe was not made to any perſon who might be treaſurer for the time being, for ſuch a promiſe would not be good in law, but perſonally to the Plaintiff by the deſcription of treaſurer, and the law will not intend a promiſe to be bad, if by any inference it can be made good. Thus if a bond be given to *A.*, *B.*, *C.*, and *D.*, churchwardens and overſeers of the pariſh of *E.*, and they go out of office, the action on the bond muſt be brought in the names of *A.*, *B.*, *C.*, and *D.*, averring that they were churchwardens and overſeers at the time when the bond was given; for the bond would not be good in law unleſs it were made perſonally to them. Upon the ſame principle if a bond be given to the churchwardens and overſeers of the pariſh of *E.*, as the bond can only be good as a perſonal obligation to thoſe who at the time when the bond was executed filled the offices of churchwardens and overſeers, the law will intend that the bond was given to thoſe

perſons,

perſons, and they may maintain the action, averring themſelves to be the ſame perſons who filled thoſe offices when the bond was given.

Sellon Serjt. *contrà* was ſtopped by the Court.

Lord ALVANLEY Ch. J. It is not neceſſary to diſcuſs whether if *A.* let land to *B.*, in conſideration of which the latter promiſes to pay the rent to *C.*, his executors and adminiſtrators, *C.* may maintain an action on that promiſe (*a*). I have little doubt however that the action might be maintained, and that the conſideration would be ſufficient; though my brothers ſeem to think differently upon this point. It appears to me that *C.* would be

(*a*) This very point aroſe in *Lowther* v. *Kelly*, 8 *Mod.* 115. where the Plaintiff's attorney had made a leaſe by indenture to the Defendant in his own name, rendering rent to the Plaintiff, whom the Defendant covenanted to pay; but the caſe appears to have been adjourned after argument without any deciſion. It is ſaid by *Levinz* J. in *Gilby* v *Copley*, 3 *Lev.* 139. that when a deed is made *inter partes* a ſtranger ſhall not take advantage of a covenant made for his benefit, but where it is not made *inter partes* he may, whether the deed be indented or not; for this he cites *Cooker* v. *Child*, *Hil.* 24 and 25 *Car.* 2. *B.R.* which was an action on a charter-party indented in theſe terms, "this indented charter-party witneſſeth, that *Bindley*, maſter and part-owner of the ſhip, with the conſent of *Cooker*, the other part-owner, hath let the ſhip to *Child* on ſuch a voyage;" and *Child* covenanted with *Bindley necnon* with *Cooker* to pay 300*l.* and it was held that *Cooker* might maintain the action. Lord *Holt* alſo, in *Salter* v. *Kidgly*, *Carth* 77. held that one party to a deed could not covenant with another who was no party, but a mere ſtranger to it. So where a bill was ſealed in this manner, "received of *A.* to the uſe of *B.* and *C.* equally to be divided, to be repaid at ſuch a time to the uſe of *B.* and *C.*," it was reſolved that *B.* and *C.* might each ſue for 20*l.* *Shaw* v. *Sherwood*, *Cro. Eliz.* 729. affirmed in error, *Yelv.* 23. But where a bond was made to *A.* for the benefit of *B.*, it was adjudged the latter could neither ſue upon it nor releaſe it, he not being party to the bond. *Offley* v. *Ward*, 1 *Lev.* 235. *Vide etiam* 2 *Inſt.* 673. With reſpect to the right of a third perſon to ſue upon a parol promiſe made to another for his benefit, there is great contradiction among the older caſes, all which are collected 1 *Vin. Abr.* fo. 333. to 337. *Actions of Aſſumpſit*, (*Z.*). But in *Dutton* v. *Poole*, *Mich.* 29 *Car.* 2. *B R.* 2 *Lev.* 210. 1 *Vent.* 318. S.C. Sir *T. Ray.* 302. S.C and Sir *T. Jones*, 102. S.C. the point ſeems to have been very fully conſidered and very ſolemnly decided. There the father of the Plaintiff's wife being ſeiſed of a wood, which he intended to fell to raiſe fortunes for younger children, the Defendant being his heir, in conſideration that he would forbear to fell it promiſed to pay his daughter, the Plaintiff's wife, 1000*l.*, for which the action was brought; and it was held that the Plaintiff might well maintain the action. Which deciſion was affirmed in the Exchequer-chamber. In that caſe, indeed, ſome ſtreſs was laid upon the nearneſs of relationſhip between the Plaintiff's wife and her father, to whom the promiſe was made; but another caſe has ſince occurred to which that reaſon does not apply. In *Martyn* v. *Hinde*, *Cowp.* 437. the Plaintiff declared againſt the Defendant, rector of *A.*, upon an inſtrument in writing, dated, &c. whereby the Defendant *promiſed the Plaintiff* to retain him as Curate till, &c. and to allow him 50*l.* *per annum*; the inſtrument produced in evidence was a certificate *addreſſed to the Biſhop*, whereby the Defendant nominated the Plaintiff his curate, and promiſed to allow him 50*l.* *per annum*. Upon this evidence the Plaintiff was, after argument, held entitled to recover againſt the Defendant. So in *Marchington* v. *Vernon*, *ante*, vol. 1. p. 101. *in notis*. *Buller* J. expreſsly ſays, "If one perſon makes a promiſe to another for the benefit of a third, that third may maintain an action upon it."

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only

1802.
PIGOTT v. THOMPSON.

only a trustee for *A.*, who might for some reason be desirous that the money should be paid into the hands of *C.* In case of marriage it is often necessary to make contracts in this manner, and the personal action is given to the trustee for the benefit of the *feme covert.* But in the present case the agreement is, that in consideration that the commissioners have let the toils to the Defendant he will pay to their treasurer. Now it is said that this amounts to a promise to pay to the person who was the treasurer at that time; but I am clear that such was not the meaning of the instrument, and that if the Defendant had been removed from his office it would have been a payment which would not have availed the Defendant if he had persisted to account with the present Plaintiff. The manifest intention of the agreement was, that the Defendant should pay the money to any person whom the commissioners should choose to make their treasurer for the time being; but by law a debt is not so assignable (*a*).

HEATH J. I am of the same opinion. It appears to me that the appointment to pay to the treasurer was meant for the benefit of the commissioners, and they alone can sustain the action.

ROOKE J. I think the contract was made with the commissioners.

CHAMBRE J. The contract is to pay to the commissioners through the medium of their officer.

Judgment for the Defendant.

(*a*) In *Fenner* v. *Mears*, 2 *Bl.* 1269, the assignee of a *respondentia* bond made to one *Cox*, with an indorsement by the obligor declaring that he would pay it to any assignee of *Cox*, was held entitled to recover against the obligor of the bond in *assumpsit*. But in that case the right of action upon the *assumpsit* never could accrue to more than one person, *viz.* the person who should be the assignee of *Cox*; whereas the agreement in the principal case professes to give the same right of action to a succession of treasurers.

May 24th.

COOK and Another *v.* BATCHELLOR.

If defamatory words be spoken of two partners respecting their trade, they may maintain a joint action for the slander, averring special damage.

THIS was an action on the case for defamation brought by two persons who were co-partners in trade. The declaration after stating that the Plaintiffs carried on trade in partnership as woolstaplers, and as such had conducted themselves with honesty and made great profit, alleged that as co-partners they had bought a quantity of wool, to be weighed by themselves and paid for according to weight, which they weighed fairly, but that the De-

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fendant speaking of them in their trade, and of their weighing the said wool said "when the wool was weighed there was a pound weight concealed under the brass weight;" there were several counts varying the expressions, and the declaration concluded with an averment that several persons (naming them) had in consequence of the speaking the said words refused to have any further dealing with the Plaintiffs. To this declaration there was a general demurrer and joinder therein.

1802.

Cook v. Batchelor.

Bayley Serjt. in support of the demurrer insisted that this action could not be maintained by two persons jointly. Although it might be said that as it was averred that the special damage had accrued to them in their trade, they ought to bring the action as co-partners; yet to this it might be answered, that as the words were spoken of them in their trade, they were actionable in themselves, and the special damage need not have been proved.

Sellon Serjt. was proceeding to argue in support of the declaration, but

The Court were of opinion that the action was well brought by the two Plaintiffs, and *Heath* and *Rooke* Js. referred to a similar case of *January* and Another *v. Spires*, in which the same point was brought before this Court some years back, when the action was held to be maintainable.

gment for the Plaintiffs (*a*).

(*a*) With respect to several persons suing or being sued jointly for slander, see the note of Mr. Serjt. *Williams* on *Coryton v. Lithebye*, 2 *Saund.* 117. *a.*

REX *v.* PERRING and Another, late Sheriff of *London*.

May 24th.

A Rule *nisi* was obtained on a former day for setting aside an attachment which had issued against the sheriff of *London* in a cause of *Weston v. Barnard*. The Defendant in the original action having been arrested in the last long vacation, on a writ returnable the first return of *Michaelmas* Term, paid into the hands of the sheriff's officer the sum of 205*l*. and the costs. On the 6th of *November* the Plaintiff ruled the sheriff to return the writ which was complied with: on the 13th *November* he ruled the sheriff to

A rule for an attachment against the sheriff for not bringing in the body, having been obtained on the 19th of *November*, and the attachment not sued out and served on the sheriff until the 9th of *March* following, the Court held the sheriff discharged, and set the attachment aside.

bring

1802. R*x* v. P*ring*. bring in the body, which rule expired on the 17th, and this not being complied with, a rule was obtained for an attachment upon the 19th, but at the desire of the sheriff's officer the attachment was not then sued out, nor was it sued out and served on the sheriff until the 9th of *March* following.

Shepherd Serjt. in support of the rule now contended that the Plaintiff by delaying to sue out the attachment for so long a time, and by giving credit to the officer had discharged the sheriff. He cited *The King* v. *The Sheriff of Surry*, 7 *T. R.* 452. where the sheriff having returned *cepi corpus* on the 30th of *January*, and the Plaintiff delayed to rule him to bring in the body until *Michaelmas* Term following, when both the bail were insolvent and the Defendant had absconded, it was held that the sheriff was discharged.

Best Serjt. *contrà* urged that the attachment, though in point of form a proceeding against the sheriff, was in fact a proceeding against the officer from whom the sheriff always takes security. That the case cited was distinguishable from this, since the Plaintiff there had neglected to give the sheriff proper notice to bring in the body of the Defendant, whereas in this case the sheriff, after having been regularly ruled for that purpose, had neglected to do his duty. That as the sheriff's officer had omitted to take a bail-bond upon the arrest, the Plaintiff was deprived of any action against the bail, and the sheriff ought to be answerable for the neglect of his officer: and that unless the attachment was suffered to issue against the sheriff the Plaintiff would be without remedy, for no action could be brought against the sureties of the officer except in the name of the sheriff, and no such action could be maintained unless the sheriff were damnified by being obliged to pay the money under the attachment. He therefore proposed that the sheriff should pay the money and bring an action against the sureties of the officer, and that the Plaintiff should indemnify the sheriff against the consequences.

The Court were of opinion that the Plaintiff had discharged the sheriff, and that the attachment therefore must be set aside. At the same time they observed, that if there were any covenant on the part of the sureties, that the officer should account for all monies received, or any other matter of which the Plaintiff could take advantage by suing in the sheriff's name, he ought to be at liberty so to do on giving the sheriff an indemnity.

Accordingly the rule was made absolute on those terms.

ORTON *v.* KNIGHT.

May 24th.

If the memorial of an annuity deed between A. B. and C., after describing the parties to the deed and the contents, state that it was executed by A and C. in the presence of E. and F., it will be no objection that B. also executed it in the presence of the same parties. For it is sufficient if the memorial state all the subscribing witnesses without specifying what signatures they respectively attested. If the memorial only state the time at which execution may be sued out by words of reference to the deed, it is fatal.

THIS was an application to set aside a judgment entered up on a warrant of attorney for securing an annuity.

The memorial stated an indenture made between *Thomas Knight* of the first part, *Joseph Ford* of the second part, and *Welles Orton* of the third part, and after specifying the greatest part of the deed, further stated that it contained a declaration and agreement that the judgment to be entered up should be only a collateral security for the annuity, and that no execution should be issued thereon "until default in payment thereof by the time and in the manner therein mentioned." The memorial further stated a bond given by *Thomas Knight* as principal, and *Joseph Ford* as surety, and likewise a warrant of attorney to confess judgment against *Thomas Knight* and *Joseph Ford*; and then proceeded thus: "And which said indenture was executed by the said *Thomas Knight* (omitting the name of *Joseph Ford*) and *Welles Orton*, in the presence of *Richard Brewer* of, &c. and *George Hargrave* of, &c. and the said bond and warrant of attorney were also severally executed by the said *Thomas Knight* and *Joseph Ford* respectively, in the presence of the said *Richard Brewer* and *George Hargrave*, who were accordingly the subscribing witnesses to the execution of the three said several instruments respectively." The indenture itself contained a proviso that execution should not be issued upon the judgment until 21 days default after the days of payment.

Best Serjt. (among other things) objected that although the memorial stated the indenture to have been made by three persons, *viz. Knight*, *Ford*, and *Orton*, yet that it did not specify who the witnesses were in whose presence *Ford* executed that instrument; and he cited *Hart* v. *Lovelace*, 6 *T. R.* 471. where the memorial of an annuity, which stated that the several securities were executed in the presence of *W. D.* and *W. M.* "or one of them," was held bad for the uncertainty with which the witnesses were described.

Shepherd Serjt. *contra*, insisted that it is not necessary to state specifically the witnesses in whose presence each of the parties executed, but that all the information is conveyed which the act requires if the memorial state all the persons who were subscribing

 witnesses

1802.

OATON v. KNIGHT.

witnesses to the deeds; that no other persons attested the deeds in this case but the two persons who were mentioned in the memorial, and that it would have been quite sufficient if the memorial had stated generally that they were the subscribing witnesses.

The Court were of opinion that as the names of all the persons who attested the instrument were specified, the object of the act had been complied with (*a*).

Best then objected that the time at which execution was to be issued upon the judgment was not sufficiently stated upon the memorial, the agreement for this purpose being only stated by words of reference to the deed: for which he cited *Cunningham* v. *Mackenzie*, *ante*, vol. 2. p. 598.

And *The Court* thinking this objection fatal, made the rule absolute for setting aside the judgment.

(*a*) But it seems that when the same witnesses attest several instruments, it will not be sufficient if the memorial only mention their names as witnesses to one. *Van Braam* v. *Isaacs*, *ante*, vol. 1. p. 451.

May 26th.

Sir CHARLES MARSH Knight and Another v. MARTINDALE.

The grantor of an annuity having agreed with the grantee to redeem, drew a bill of exchange for 5000*l.* at three years, which the grantee discounted in the following manner; he took 4083*l.* 6*s.* 8*d.* as the amount of the purchase-money and arrears, advanced 166*l.* 13*s.* 4*d.* to the grantor in cash, and took 750*l.* as interest for three years upon 5000*l.* —Held that the transaction was usurious.

DEBT on bond. The Defendant, after craving oyer of the bond pleaded *non est factum*, and several special pleas of usury. The cause was tried before Lord *Alvanley* Ch. J. at the *Westminster* Sittings after last *Michaelmas* Term, when the jury found a verdict for the Plaintiffs, subject to the opinion of the Court upon a special case; at the same time declaring that they believed the Plaintiff Sir *Charles Marsh* did not think that he was acting contrary to law.

The material facts of the case were as follow:—In *April* 1790 Colonel *Robert Wood* had granted to the Plaintiff Sir *Charles Marsh* and *Henry Deane* (since deceased) annuities to the amount of 500*l.* in consideration of 3,500*l.* paid to them by the said *Robert Wood*, which annuities were redeemable on payment of the original consideration-money, and also arrears, costs, charges, and expences. In *June* 1792, the annuities not being regularly paid, Colonel *Wood* applied to the Plaintiff Sir *Charles Marsh* and the said *Henry Deane* to negotiate a bill in order to redeem the said annuities; and on the 21st of *June* 1792 the Plaintiff Sir *Charles*

Marsh,

Marsh, in consequence of a letter from the said *Henry Deane*, met Colonel *Wood* at the house of *Benjamin Martindale* and *Edward Fitch* in *St. James's-street, Westminster*, when a bill of exchange, which Colonel *Wood* brought with him to the meeting, was produced by him, and Sir *Charles Marsh* agreed to discount it, which bill of exchange was as follows:

1802.
MARSH
v.
MARTINDALE.

"Sirs, *London, June* 21st 1792.

"At three years after date please to pay Sir *Charles Marsh*, *Henry Deane* Esq. and Company, or order, the sum of five thousand pounds, value received by

Your humble servant,

£. 5000. (Signed) *Robert Wood*.

To Messrs. *Benjamin Martindale*,
Fitch, and Company. Accepted, M. & F."

The 5000*l.* was made up as follows:

Purchase of the annuities - - -	3,500	0	0
Half a year's annuity due - - -	250	0	0
For redeeming the annuity without notice according to the condition of the deed - -	250	0	0
Two months' annuity due - - -	83	6	8
Paid by Sir *Charles Marsh* to Colonel *Wood* in Cash	116	13	4
	4,250	0	0
For discount for three years on 5000*l.*	750	0	0
	5000	0	0

At this meeting of the 21st of *June* 1792 Sir *Charles Marsh*, having the bill of exchange, desired that he might have a bond in the place of it, thinking that a better security; and accordingly a bond was prepared and given instead of the bill of exchange, which, together with the annuity deeds, was delivered up by Sir *Charles Marsh* for the bond. The bond was a joint bond by Colonel *Wood*, *Benjamin Martindale*, and *Edward Fitch*, for 10,000*l.*, conditioned to be void on payment of 5000*l.* on the 21st of *June* 1795, "without any interest for the same, and without any deduction or abatement whatever." Sir *Charles Marsh* had no attorney or solicitor or man of the profession present on his behalf. In *June* 1795, Colonel *Wood* being then abroad, it was agreed by the Plaintiff to accept the bond mentioned in the declaration (which was a joint and several bond) from *Benjamin*

 Martindale,

1802.
MARSH v. MARTINDALE.

Martindale, *Edward Fitch*, and the Defendant *John Martindale*, in lieu of the first mentioned bond of the 21st of *June* 1792.

The question for the opinion of the Court was, Whether the verdict ought to stand? if not, a nonsuit to be entered.

Onslow Serjt. for the Plaintiffs. In this case there was no corrupt agreement within the meaning of the statute of *Anne*, for it was either a common transaction of discount within the protection of the law, or a purchase of an annuity upon terms. 1st, The sum of 750 *l.*, which was deducted for discount, amounts to no more than legal interest upon 5000 *l.* for three years; and though it were taken in advance, yet that is the ordinary mode of discount practised by the Bank of *England*; and if the bill in this case had been of a shorter date, no doubt could have been entertained upon the subject. But the mere length of time cannot make any difference in the case, if the agreement was not corrupt and intended as a cover for taking more than 5 *l. per cent.*; for many bills in the course of trade are drawn both from *India* and *Africa* of a date nearly if not quite as long, and yet the discount of such bills has never been deemed usurious. In the case of Sir *B. Hammett* v. *Yea*, *ante*, vol. 1. p. 151. it is said by *Eyre* Ch. J. that "where a party on a contract for a loan intentionally takes more than 5 *l. per cent. per annum* for forbearance of that loan he is guilty of usury, but that whether more than 5 *l. per cent.* is intentionally taken upon any contract for such forbearance is a mere question of fact for the consideration of a jury, and must always be collected from the whole of the transaction as it passes between the parties." Now the jury in the present case have expressly negatived any intention on the part of the Plaintiff to act corruptly; and indeed it appears from the case that the note was discounted for the accommodation of Colonel *Wood*. 2dly, The transaction does not amount either to a loan or forbearance of money, but merely to a purchase of an annuity upon terms. Colonel *Wood* might have had a right to redeem the annuity upon payment of a certain sum in ready money; but as he made no offer of that kind, he must be considered in the same light as any other purchaser of an annuity, from whom the vendor may require such terms as he thinks proper without incurring the guilt of usury. In the case of *Yeoman* v. *Barstow*, 1 *Lutw.* 471. the Plaintiff declared that in consideration that he had delivered to the Defendant hammered silver money in number and tail to the amount of 300 *l.* the Defendant promised at the end of eight months to pay 300 *l.* in new milled money, together with 4 *l.* 10 *s.* for interest or consideration for every 100 *l.*

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of the old hammered money; and the Court were of opinion that there was no loan, and that without a loan there could be no usury; and it was said that if a man have great occasion for guineas, and can make a great advantage of them, and for this purpose give another money beyond their value, this is no usury. So in this case, if there was no loan, the transaction cannot amount to usury, though more was given for the annuity than it was really worth.

Bayley Serjt. *contrà*. Although it be lawful upon the discount of a bill of exchange to take interest upon the whole amount of the bill at the time when the money is advanced, yet that practice must be considered as an exception to the general rule of law, and must be confined to transactions upon bills in the ordinary course of trade. It has not been found by the jury that this bill, which is for three years, was discounted according to the usage of trade; and it is too much to infer that because bills in the ordinary course of trade may lawfully be discounted in the manner above stated, a bill for any period of time may be discounted in the same manner; since the consequences of such a doctrine would defeat the provisions of the statute. Suppose a bill for 10,000 *l.* at ten years to be discounted in this manner, the interest for that period would amount to 5000 *l.* consequently the lender would advance but 5000 *l.* and at the end of ten years would receive double that sum; and if the bill, instead of being drawn for ten years were drawn for twenty, the interest would amount to the whole sum of 10,000 *l.*, and the lender would have nothing to advance, though he would be entitled to 10,000 *l.* at the end of the time. It is true that the receipt of interest before it becomes due without any previous agreement to that effect does not amount to usury. *Hawk. P. C.* b. 1. c. 82. s. 14. ed. 3. But if the agreement be that the lender shall deduct the interest at the time when the money is advanced, the sum really forborn is not the whole sum mentioned in the bill, and therefore it is usury. *Barnes* v. *Worledge*, *Noy.* 41. *Yelv.* 30. S. C. *Cro. Jac.* 25. S. C. *Moor*, 644. S. C. and *Dalton*'s case, *Noy.* 171. 2dly, It is contended that this was a mere re-purchase of the annuity upon terms. It is true that Sir *Charles Marsh* was not bound to agree to the redemption of the annuity unless ready money were paid, but it appears by the case that he did agree to the re-purchase; that the terms of redemption amounted to 4,083 *l.* 16 *s.* 8 *d.* and that Sir *Charles Marsh* paid 166 *l.* 13 *s.* 4 *d.* in money, making all together

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1802.
MARSH
v.
MARTINDALE.

the sum of 4,250 *l.* This is all that was advanced to Colonel *Wood*, and yet interest was taken upon 5000 *l.* The sum of 4250 *l.* became a debt due to Sir *Charles Marsh*, and the taking 750 *l.* for the forbearance of that sum was usurious. With respect to the interest, if a person by mistake receive more than 5 *l. per cent.* it will not amount to usury; but if he agree to receive more than that rate of interest the reservation will be illegal, and will vitiate the security, though he may not be aware that he is contravening the statute.

Cur. adv. vult.

The opinion of the Court was this day delivered by

Lord ALVANLEY Ch. J. The question in this case arises on the validity of the first bond; in lieu of which the second bond was given (*a*). It is contended on the part of the Plaintiff, that the transaction as it appears upon the case, is neither more or less than the purchase of an annuity, and not in the nature of a loan or sum taken for the forbearance of money due: and if that could be made out the Plaintiff would be entitled to recover. It is also contended, that at all events the negotiation of the bill of exchange was a transaction in the usual mode, in which all persons possessed of bills of exchange have been permitted to discount them; in which cases the interest is always deducted from the money advanced. It certainly has been determined that such a transaction on a bill of exchange in the way of trade, for the accommodation of the party desirous of raising money, is not usurious, though more than five *per cent.* be taken upon the money actually advanced. In such cases the additional sum seems to have been considered in the nature of a compensation for the trouble to which the lender is exposed: and unless that indulgence were allowed, it might not be worth while for any merchant to discount a bill. If, therefore, nothing more has been done in this case than what always has been done by way of accommodation among merchants, the transaction was not usurious: but the rule must be confined strictly to that sort of transaction; for if discount be taken upon an advance of money without the negotiation of a bill of exchange it will amount to usury, as appears clearly from the cases which were cited in the argument. We must therefore consider what

(*a*) The latter bond being a substitution for the first bond, which first bond was given by way of substitution for the bill on which the usury arose, and the whole transaction being between the original parties, the latter securities were infected by the infirmities of the former. *Cuthbert* v. *Hayley*, 8 *T. R.* 390. But if the latter securities had been given to an indorsee of the bill without notice of the usury, it would have been otherwise. *Ibid.*

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was the real transaction between the parties. I stated to the jury that if a man agree to take more than five *per cent.* for the forbearance of money, the law declares that such an agreement is corrupt within the statute of *Anne*, whether the party thought at the time that he were acting contrary to the statute or not. And though the jury have found that Sir *Charles Marsh* did not think that he was acting contrary to law, there is nothing in that finding to prevent us from examining the transaction and declaring it to be corrupt if it appear to us to be so in point of law, without sending the case back to a jury to find the corruption. It was however contended, that the transaction was to all intents a purchase of an annuity; and this certainly was the strongest ground which the Plaintiff could take, for it has been determined in all the cases upon the subject, that a purchase of an annuity, however exorbitant the terms may be, can never amount to usury. But if the transaction respecting the annuity be only a cover for the advancement of money by way of loan, it will not exempt the lender from the penalty of the statute, or prevent the securities from being void. Then is this transaction the purchase of an annuity or is it not? I admit that if the annuity had been irredeemable, the Plaintiff would have had a right to say that he would not sell it under 5000*l.* But here Colonel *Wood* was entitled to redeem the annuity on payment of the several sums stated in the case, amounting to 4083*l.* 6*s.* 8*d.* It was then proposed that Sir *Charles Marsh* should advance 166*l.* 13*s.* 4*d.* making with the purchase money of the annuity 4250*l.*, and that he should discount a bill of 5000*l.* at three years. What is this but forbearing for three years to take the sum of 4250*l.*, for which forbearance he was to receive interest on 5000*l.*? The jury were impressed with a notion that a bill at three years was such a bill as no reputable man would discount; though it was said that some *East India* bills of two years' date had been discounted. Indeed Lord Chief Justice *Eyre* seems to have thought that the length of the date of a bill was sufficient to afford a presumption that the discount was intended as a cover for a loan. And if we consider the effect of discounting bills at very long dates, the strength of this presumption will be manifest; for if the practice be carried to a great length, the interest will annihilate the principal. I think therefore, that the discount of such a bill as this, not coupled with the transaction respecting the annuity, would have been almost sufficient to have afforded a presumption of

1802.

MARSH v. MARTINDALE.

usury; but coupled as it is with the redemption of this annuity, it is impossible to wink so hard as not to see what the real transaction is. Then why was not the bond given in the first instance instead of the bill of exchange? The reason is obvious: the 750*l.* which was taken as interest was not then due; but by drawing a bill of exchange at three years for 5000*l.* for the purpose of being discounted, and adding the interest upon that bill to the 4250*l.*, a capital sum of 5000*l.* to be paid in three years was created, for which sum the bond could not have been given in the first instance. Some old cases have been cited to shew the opinion of lawyers upon usury before the statute of *Anne.* The case of *Barnes* v. *Worledge*, *Noy*, 41. variously as it is reported in that book, and in *Cro. Jac.* 25. *Yelverton*, 31. and *Moor*, 644. in respect of the opinions of the particular Judges, seems to shew that so early as the time of *James* the First, and before the present statute of usury, it was considered that if it were agreed that part of the principal should be retained at the time of the loan, or be paid before the expiration of the year, it would be usury, because the borrower would not have the use of the sum upon which the interest was taken for the whole year. And the expression of *Popham* J. in *Dalton*'s case, *Noy*, 171. is to the same effect. There is also a case of *Symonds* v. *Cockerill*, *Noy*, 151. which is extremely applicable to the second point of this case. There a question having arisen whether a deed securing a rent charge were void for usury, the Court agreed that "if the original contract was for to have a rent charge, that is not usury, but a good bargain and pennyworth; but if the party had come for to borrow the money, and then such a bargain had ensued by security, then that is usury." Let us see then whether the doctrine laid down in *Barnes* v. *Worledge* and *Dalton*'s case has been relaxed by modern decisions. In *Massa* v. *Dauling*, 2 *Str.* 1243. it was contended that a note for 200*l.* at three months, given upon the advance of 197*l.*, and another note for 200*l.* taken at the end of the three months upon the advance of 3*l.* for those three months, was not usury, it being insisted that it was an absolute purchase of the notes: but *Lee* Ch. J. held, and the jury found, that it was not a purchase but a loan, and consequenty usurious. In *Richards* v. *Brown*, *Cowp.* 770. the transaction in form was the purchase of an annuity, but it appearing that in substance it was a loan under colour of an annuity, the Court held it within the statute of usury. In *Lowe* v. *Waller*,

Dougl. 740., Lord *Mansfield* says what is very applicable to the present case, " No shift will enable a man to take more than legal interest upon a loan: therefore the only question in all these cases is, What is the real substance of the transaction? not, What is the colour and form? This is one of the strongest cases of the sort I ever knew litigated: it is impossible to wink so hard as not to see that there was no idea between the parties of any thing but a loan of money." It is true that the cases of *Auriol* v. *Thomas*, 2 *T. R.* 52. and Sir *B. Hammett* v. *Yea*, in this Court, have completely established that in the discount of bills a banker may take more than 5 *per cent.* if the excess be only taken to defray the expences of remittance, provided such excess be reasonable, and that it be not a cover for usurious interest. In such cases, therefore, the only question is, Whether it be a real discount in the way of trade, or a mere loan of money? In the present case, no man looking at the circumstances can entertain a doubt that the transaction was not a discount in the way of trade, but was merely employed as the means of obtaining more than legal interest. It only remains for me to notice the case of *Yeoman* v. *Barstow*, *Lutw.* 271. as to which I must say, that I do not quite understand it, nor should I have concurred in the judgment there given, although it proceeds on grounds which seem to be very distinct from the present case. In that case I think it might have been inferred that the transaction was a colour for taking more than legal interest: but the Court thought that it did not necessarily appear that the transaction was usurious, and therefore they gave judgment for the Plaintiff. In this case we are of opinion that sufficient appears to shew that the agreement was corrupt in law, whatever the intention of the Plaintiff may have been. The bill of exchange was given to secure a much larger sum than legal interest on the sum which would be due at the end of three years, and the bond, being given in lieu of that bill, is therefore void.

Per Curiam, Let a nonsuit be entered.

May 31st.

Joseph Johnson *v.* John Johnson.

A. by will devised to *B. C. D.* and *E.* two parcels of land upon trust to sell and divide the money among his brothers' and sisters' children. *B. C. D.* and *E.*, the latter, being one of 24 persons entitled under the will to a share of the money, were proceeding to sell when it was agreed by the three first trustees and the 23 other persons entitled to the money that *E.* should become the purchaser of the two parcels of land, paying 300*l.* for one and 700*l.* for the other. A conveyance was accordingly prepared and executed by *B.* and *C.* only, upon which *E.* took possession of the lands, and paid the purchase-money, which was divided among the several persons entitled under the will. *E.*, being afterwards evicted from the smaller parcel in consequence of a defect in the title derived under the will, brought an action for money had and received against one of the 23 persons to recover the share of the 300*l.* received by him, at the same time refusing to give up the parcel of land for which 700*l.* had been paid. *Held* that he was entitled to recover.

Assumpsit for money had and received.

The cause was tried before *Heath* J. at the *Summer* assizes for *Warwick* 1801, and the Plaintiff was nonsuited. In *Michaelmas* Term following, a rule *nisi* for setting aside the nonsuit and having a new trial was obtained; but afterwards, at the desire of the Court, it was agreed that a special case should be drawn up, the material facts of which were as follow:

William Johnson of *Rugby*, being possessed for the remainder of a term of 1900 years of a house and little close in *Rugby*, by indenture of the 22d *August* 1761, in consideration of an intended marriage (afterwards solemnized) between himself and *Anne Langley*, assigned the above premises to *John Walker* and *Joseph Johnson*, their executors, administrators, and assigns, in trust to permit the said *William Johnson* to enjoy the premises for the remainder of the term if he should so long live; remainder after his death to his intended wife for her life; and after her decease upon trust to permit and suffer the heirs of the body of the said *Anne Langley* by the said *William Johnson* lawfully begotten, to receive the rents and profits during the remainder of the term; and in default of such issue, to permit the executors, administrators, and assigns of the said *William Johnson* to receive and take the rents and profits during the remainder of the term. This deed also contained a power of revocation to *William Johnson* and *Anne Langley* during their joint lives. *William Johnson* by will, dated the 12th *December* 1732, devised as follows: "*Item*, I do hereby ratify and confirm the settlement of my house in *Rugby*, wherein I now live, with the close and appurtenances thereto belonging, made on my marriage with my present wife; and subject to such uses as are contained in the said settlement, I do give and bequeath all my reversion, remainder, and interest in the same premises unto *Edward Boddington*, *Thomas Walker*, *Joseph Johnson* (the Plaintiff), and *Philip Williams*, and to their executors, administrators, and assigns, in trust that they and the survivors, &c. shall, as soon as the uses in the said settlement shall be spent and executed, or otherwise ended and

determined,

1802.

JOHNSON v. JOHNSON.

determined, or at such time sooner as they shall think proper, sell and dispose of my said reversion and remainder in the same premises for the best price or prices which can be procured for the same, and shall pay and dispose of the monies arising from such sale unto and amongst all and every of my brothers' and sisters' children which shall be surviving, in equal shares and proportions." And after reciting in his will that about the time of the inclosure of *Rugby* fields he had purchased one yard-land in *Rugby* for the remainder of a term of 3000 years, and that on the late inclosure thereof there was awarded to him in lieu thereof a plot of ground containing 16 acres 3 roods or thereabouts, and that he (*William Johnson*) borrowed some money on bonds towards paying the purchase thereof, he "gave and bequeathed the said plot of ground, with the appurtenances, unto the said *E. W.*, *T. B.*, *J. J.*, and *P. W.*, their executors, administrators, and assigns, for the residue and remainder of the said term, in trust that they should out of the rents and profits, and by mortgage of the said plot of ground, raise the said principal money and interest which should be owing on the said bonds, and pay the same in discharge of the said bonds, and subject to such charge so to be made on the said lands, in trust to permit and suffer the rents and profits of the same plot of ground to be received by his wife *Anne Johnson* until his son *Thomas Johnson* should attain 21; and as soon as he should attain 21, in trust to permit and suffer the rents and profits thereof to be received by him during his life; and after his decease, in case his son should leave any children, in trust for them; but in case he left no child, but left a widow, then in trust that the rents should be paid to her for her life; and after the decease of his son's children and widow, in trust for his (the testator's) wife for life; and after her decease, in trust to sell and dispose of the said plot of land for the best price which could be got for the same, and to pay and dispose of the money arising from such sale unto and amongst all and every of his (the testator's) brothers' and sisters' children which should be then living, in equal shares and proportions." *William Johnson* appointed his wife *Anne Johnson* sole executrix of his will, and died in 1784, without having altered it. In 1788 his widow *Anne Johnson* died, leaving the testator's son, *Thomas Johnson*, her surviving; and in 1791 the said *Thomas Johnson* the son died a bachelor and intestate, aged 26 years. Upon the death of the widow and son of *William Johnson* the testator without issue,

1802.

JOHNSON v. JOHNSON.

the trustees entered into possession of the trust premises, and were about to sell them, when *Joseph Johnson* (the Plaintiff), one of the trustees, and also one of the legatees, being desirous to purchase, application was made to his co-trustees, as also to the different legatees (being 23 in number besides himself), to know the terms on which the premises were to be sold; and it was finally agreed by the trustees and by all the legatees (witnessed by a memorandum in writing to that effect, and signed by them, including the Defendant who was one of the legatees) to sell the house for 300*l.* and the land for 700*l.*, each being distinctly valued. This sum the Plaintiff agreed to give, and the following articles were in consequence prepared: "Be it remembered that it is this day agreed between *Edward Boddington* of, &c. *Philip Williams* of, &c. and *Thomas Walker* of, &c. and *Joseph Johnson* of, &c. as follows; to wit, the said *E. B.*, *P. W.*, and *T. W.* do hereby agree that they will, at their expence, on or before *Old Lady-day* next, make out a good title to, and by conveyances and assignments, to be prepared at the costs of the said *Joseph Johnson*, grant and assign unto the said *Joseph Johnson*, his heirs, executors, administrators, or assigns, or as he or they shall direct, All that messuage or tenement, outbuildings, backside, and appurtenances to the same belonging, situate in *Rugby* aforesaid, now in the occupation of Mr. *W. L.*; and also all that allotment of land lying in the fields of *Rugby* aforesaid, containing 16 acres and three roods or thereabouts, now in the occupation of Mr. *S. D.*, together with all rights, &c. &c.: In consideration whereof, the said *Joseph Johnson* doth agree that he will pay or cause to be paid unto the said *E. B.*, *P. W.*, and *T. W.*, at the time above limited, the sum of 1000*l.* as and for the purchase-money for the said premises." Then followed some stipulations in favour of the purchaser, but not material to be stated; and the articles were signed by *Edward Boddington*, *Philip Williams*, *Thomas Walker*, and *Joseph Johnson*. In pursuance of the above contract, the title deeds were delivered to the Plaintiff's attorney, by whom an assignment of the land was prepared from the mortgagee and the parties interested, which was executed by *Edward Boddington* and *Philip Williams*, but not by *Thomas Walker*, the other trustee, or any other person. An indenture of assignment of the house and premises in *Rugby* was also prepared, to which the four trustees were made parties of the first part; *Job Walker* and *Lucy* his wife, and *Samuel Walker* and *Elizabeth* his wife, (the said *Lucy* and *Elizabeth* being

surviving acting executrixes of *John Walker* who survived *Joseph Johnson* his co-trustee in the trust created by the deed of the 22d of *August* 1761,) of the second part; and one *J. B.* of the third part; and it was therein witnessed that the said *Edward Boddington*, *Thomas Walker*, and *Philip Williams*, at the request of *Joseph Johnson* (the Plaintiff), and the said *J. W.* and *Lucy* his wife, and *S. W.* and *Elizabeth* his wife, assigned to *J. B.* as trustee for *Joseph Johnson* (the Plaintiff) the remainder of the term of 1900 years in the house and premises in *Rugby*. This deed was executed by *E. B.* and *P. W.* two of the trustees, but by no other person. On the 17th of *April* 1792 a meeting of the legatees was holden, at which the Plaintiff and *Philip Williams* one of the trustees attended, and the purchase-money was then divided among the legatees according to their respective shares. The Defendant received his share, amounting to 29 *l.*, and signed a paper acknowledging his receipt from the four trustees of his share, and discharging them and the estate. At the *Lent* assizes 1797, at *Warwick*, a Mrs. *Sutton*, who was the aunt and next of kin of the testator's son *Thomas Johnson*, recovered from the Plaintiff the house and premises situate in *Rugby* by ejectment, and afterwards obtained a verdict for the mesne profits thereof, amounting to 74 *l.* 5 *s.* Upon this event taking place, 18 out of the 24 legatees paid back to the Plaintiff their several proportions of the money received by them on the sale of the house and premises to the Plaintiff; but the Defendant and five others refusing to do the same, the present action was commenced in order to determine the question. The Plaintiff is still in possession of the plot of land in *Rugby* fields (upon which he has expended a considerable sum of money in building, drainage, and other improvements), being part of the premises purchased for the said sum of 1000 *l.* under the aforesaid agreement entered into between him and the other trustees, and receives annually the rents and profits thereof, amounting to 35 *l.* 14 *s.* to his own use; and on application made to him on the part of the Defendant, refuses to relinquish the purchase of the plot of land, and to resell the same for the parties interested under the testator's will.

The question for the opinion of the Court was, Whether an action for money had and received was maintainable by the Plaintiff against the Defendant under the above circumstances? If so, then a verdict to be entered for the Plaintiff; but if the Court should be of a contrary opinion, then a verdict to be entered for the Defendant.

Vaughan

1802.
JOHNSON v. JOHNSON.

Vaughan Serjt. for the Plaintiff. This case falls within the general principle that where money has been paid upon a legal consideration which has failed, it may be recovered back in this form of action. Now the consideration upon which the Plaintiff paid to the Defendant as one of the legatees his proportion of the 300*l.* for which the house and close in *Rugby* were purchased, was the covenant of the three other trustees to convey to him the above premises with a good title. But the limitation to the personal representatives of the settlor in the deed of 1761 being too remote after an estate tail (*a*), and the whole interest in the remainder of the term having under that deed of settlement vested absolutely in the testator's son, there was nothing upon which the devise to *Edward Boddington*, *Thomas Walker*, *Joseph Johnson*, and *Philip Williams*, could operate, and consequently the three covenanting trustees were unable to fulfil their covenant. The question therefore is, Whether the Defendant who as a legatee has received money from the Plaintiff on the consideration of the trustees conveying a good title, can retain that money now the title proves bad? If it be said that the purchaser is bound to guard himself by proper covenants, the same answer might have prevailed in *Picketon* v. *Litecote* and Others, *Vin. Ab.* v. 21. p. 541. tit. *Vendor and Vendee* (B); and yet there a *subpœna* is said to have issued against a vendor to shew cause why he should not repay the money received upon a sale of the reversion of a copyhold which the vendee could not enjoy. Indeed the principle upon which the case of *Shove* v. *Webb*, 1 *T. R.* 732. proceeded is very applicable to the present; for there a party was allowed to recover back the money paid as the consideration for an annuity, the annuity having been set aside for a defect in the memorial; and yet it might have been contended there, that it was the Plaintiff's own fault that the annuity was set aside, because he had not secured himself by a proper memorial. But the case of *Cripps* v. *Reade*, 6 *T. R* 606. is decisive in favour of the Plaintiff's demand; there, as in this case, the conveyance of the property purchased by the Plaintiff not having actually taken place, but the whole still remaining *in fieri*, the Plaintiff recovered back his purchase money on the title proving defective. Lord *Kenyon* in that case adverted

(*a*) Where there is an express limitation of a chattel by words, which if applied to a freehold would create an *express estate-tail*, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect." *D. per Ashhurst* J. *Doe* d. *Lyde* v. *Lyde*, 1 *T. R.* 596. and admitted *per Buller* J. *ibid.*

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to the rule of *caveat emptor*, as laid down in *Bree* v. *Holbech*, *Doug.* 655. and said he did not wish to disturb it, but distinguished the case then in judgment on the ground of no conveyance of the purchased property having been executed to the purchaser. So here the indenture of assignment having been executed by two only of the four trustees and by no other person, the conveyance remained incomplete, and the Plaintiff is entitled to recover back from the Defendant that money which the latter cannot in conscience retain.

Bayley Serjt. *contrà*. The Plaintiff is not entitled to recover back the money which he has paid from any person; but if he be entitled to recover it back, still he cannot recover it from the present Defendant, nor in this form of action. There is no fraud in this case, and therefore the rule of *caveat emptor* must prevail as laid down in *Bree* v. *Holbech*. Indeed the proper remedy for the Plaintiff to adopt is to sue the three trustees, who by the article entered into in 1791 covenanted to convey. [Lord *Alvanley* Ch. J. If he were to sue on that article he would recover 1 *s.* damages in a court of law, and a court of equity would not compel the trustees to convey that to which they had no title.] The case of *Cripps* v. *Read* is distinguishable from the present, because there the action was brought against the very party who had sold the property as well as received the money, and the sale rested merely on a parol undertaking, and not as in this case on an article executed by those in whom the right to convey was supposed to be. But at all events the present Defendant is not liable to be sued, for the contract of sale and the covenant to convey was made by the trustees with the Plaintiff, and the Defendant was no party to that contract. The rule therefore applies that where an express contract between the Plaintiff and other parties is proved, the Court will not imply a contract between the Plaintiff and Defendant respecting the same subject matter. Indeed the only way in which the legatees were concerned in the transaction was in giving their consent to what the trustees thought fit to do. Nor is this the proper form of action to recover the money which has been paid, for the special contract is not rescinded, and till that is done the action for money had and received cannot be sustained. That the contract is not rescinded appears from the Plaintiff still retaining part of his purchase; now as the sale of the whole was entire, the Plaintiff is not at liberty to rescind the contract in part and con-

 sider

1802.
JOHNSON
v.
JOHNSON.

ſider it as ſtill ſubſiſting as to the remainder. Had this property been ſold in parcels and by two diſtinct contracts, poſſibly a very different price would have been demanded and paid. The action is altogether novel, being an attempt to ſue legatees in a court of law, and to recover part of the money paid under a ſpecial contract, by treating that contract as reſcinded in part.

Vaughan in reply obſerved, that the Defendant was not ſued as a legatee, but as one retaining money paid to him upon a conſideration which had failed, and which he therefore could not in conſcience retain. He added, that to ſue the truſtees would only produce a multiplicity of actions, for they would of courſe ſue the legatees if the Plaintiff recovered againſt them; and that the valuation of the houſe in *Rugby* and the valuation of the plot of land being diſtinct, the Plaintiff had a right to treat them as two diſtinct contracts, and conſequently might reſcind the one and abide by the other.

Cur. adv. vult.

The opinion of the Court was this day delivered by

Lord ALVANLEY Ch. J. who after ſtating the caſe proceeded thus:—The premiſes out of which the preſent diſpute ariſes were, together with the plot of land in *Rugby* field, purchaſed by the Plaintiff for the groſs ſum of 1000 *l.*; but, it is to be remembered that the houſe in *Rugby* and the plot of land in *Rugby* field were each diſtinctly valued, the former at the ſum of 300 *l.* and the latter at the ſum of 700 *l.*; and upon thoſe diſtinct valuations that contract was entered into which was afterwards reduced into the form of an agreement, and that deed of agreement was prepared which was executed by two only of the truſtees, and by no other perſon. The contract having been thus far carried into execution, it was diſcovered that the limitation to the repreſentatives of the ſettlor in the deed of 1761 was too remote, in conſequence of which an ejectment was brought by the perſon entitled, and the Plaintiff, who had paid the money, but to whom no legal conveyance had been made, was evicted from the poſſeſſion. The flaw therefore being diſcovered before the purchaſe was completed, there is no pretence to ſay that the Plaintiff had bought the eſtate, and that having obtained the title for which he contracted, he muſt abide by the conſequences. The Plaintiff, upon being evicted, was obliged to refund the rents and profits, and ſeveral of the perſons intereſted conſented to repay their proportions of the purchaſe-money; but

fome (among whom is the prefent Defendant) have refufed; and the queftion now is, Whether under thefe circumftances the Plaintiff be entitled to recover againft the Defendant in an action for money had and received? My Brother *Heath* nonfuited the Plaintiff at the trial, on the idea that the object of the action was to call upon a legatee to refund a legacy; a matter which he thought could only be agitated in a court of equity. It turns out however that this is not an action for re-payment of a legacy. If fuch had been the object of the action, I agree that it could not have been maintained. If an executor, thinking that he has fettled the affairs of his teftator, pay the legacies, I have no difficulty in faying that a court of common law would not entertain an action for money had and received againft a legatee, fince fuch a court cannot take into confideration, as a court of equity would do, the mode in which the funds might have been applied. In the cafe of *Mofes v. Macferlan*, 3 *Burr.* 1005., fome principles were laid down, which are certainly too large, and which I do not mean to rely on: fuch as that, wherever one man has money which another ought to have, an action for money had and received may be maintained; or that wherever a man has an equitable claim he has alfo a legal action. I agree with the opinion of my Lord Chancellor in the cafe of *Cooth* v. *Jackfon*, 6 *Vef.* Jun. 39. where he expreffes his doubt whether the courts of law have not gone too far in the difcuffion of equitable rights, fince they cannot adminifter equity in the fame way as courts of equity do; and fhews that great injuftice may arife from fuffering a Plaintiff to prevail in a court of law, whereas, if he were obliged to feek his remedy in a court of equity, much would alfo be provided in the Defendant's favour. No man therefore is more difpofed to be cautious in admitting equitable matters to be agitated in a court of law than myfelf. But as this is not a cafe between an executor and a legatee, in which the former feeks to recover the amount of any legacy paid to the latter, but between the purchafer and vendor of an eftate, my difficulty has been how far the agreement is to be confidered as one contract for the purchafe of both fets of premifes, and how far the party can recover fo much as he has paid by way of confideration for the part of which the title has failed, and retain the other part of the bargain. This for a time occafioned doubts in my mind: for if the latter queftion were involved in this cafe it would be a fubject for a court of equity. If the queftion

1802.

JOHNSON v. JOHNSON.

tion were how far the particular part of which the title has failed formed an essential ingredient of the bargain, the grossest injustice would ensue if a party were suffered in a court of law to say that he would retain all of which the title was good, and recover a proportionable part of the purchase-money for the rest. Possibly the part which he retains might not have been sold unless the other part had been taken at the same time: and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. But a court of equity may inquire into all the circumstances, and may ascertain how far one part of the bargain formed a material ground for the rest, and may award a compensation according to the real state of the transaction. In this case however no such question arises: for it appears to me that although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts; and that the one part was sold for 300 *l.* and the other for 700 *l.* It has not been suggested that they were necessary to the occupation of each other. It amounts therefore to no more than this: that the Plaintiff being one of the executors who were about to sell the house, and also to sell the land, to both of which the legatees undertook to make a good title, advanced his money to the legatees on the purchase of those two lots, and now seeks to recover back the money for one of them, because the title to that has proved defective. We by no means wish to be understood to intimate that where under a contract of sale a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper covenants: where the vendor's title is actually conveyed to the purchaser the rule of *caveat emptor* applies. In the present case the Plaintiff never has had any title conveyed to him, and therefore we are of opinion, notwithstanding the party sued is a legatee, that the Plaintiff has paid his money under a mistake, consequently the rule adopted in courts of law in such cases applies to him, and entitles him to recover that money from the party to whom it has been paid in an action for money had and received.

Per Curiam, Judgment for the Plaintiff.

3

PITCHER *v.* MARTIN.

May 31st.

In *C. B.* a plea of bankruptcy must be signed by a Serjeant.

IN this case a question arose, Whether a plea of bankruptcy ought to be signed by a Serjeant?

The Court, after referring to the officers, decided that by the practice of this Court such a plea must be signed by a Serjeant, and might be treated as a nullity if not so signed (*a*).

(*a*) A tender of issue must be signed by a Serjeant, but a joinder in issue need not. Vide *Ellis* v. *Govey*, *ante*, vol. 1. p. 469. Both a demurrer and a joinder in demurrer must be so signed. *Brooker* v. *Simpson*, *ante*, vol. 2. p. 336. *Douglas* v. *Child*, *ibid. in notis.*

END OF EASTER TERM.

1802.

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Trinity Term,

In the Forty-ſecond Year of the Reign of GEORGE III.

June 21ſt.

PARTRIDGE *v.* SOWERBY.

A. agreed to under-let his houſe to *B.* the latter paying for the furniture at an appraiſement; held that *B.* was excuſed from the performance of the agreement, becauſe *A*, at the time he quitted the houſe, was in arrear for rent to his landlord.

ASSUMPSIT upon a ſpecial agreement.

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Eaſter* term, when it appeared that an agreement was entered into between the Plaintiff and the Defendant that the former, who was tenant of a certain houſe, ſhould let the ſame to the latter for a year from the *Chriſtmas-day* then following, and that whatever houſehold furniture ſhould be left by the Plaintiff upon the premiſes ſhould be appraiſed, and that the Defendant ſhould take it at the appraiſed value, and that the money ſhould be paid on or before the 1ſt of *January* then next. At *Chriſtmas-day* the Plaintiff quitted the houſe, leaving ſome furniture upon the premiſes; he offered poſſeſſion to the Defendant, and gave him notice that a broker would attend to value the furniture. The Defendant refuſed to fulfil the agreement on account of ar-

rears

rears of rent being due from the Plaintiff to the landlord. Upon this evidence his Lordship nonsuited the Plaintiff.

Clayton Serjt. now moved for a rule to shew cause why the nonsuit should not be set aside, urging that as the Plaintiff had done every thing to fulfil his part of the agreement, the Defendant was bound to perform what he had contracted for.

But *The Court* were of opinion that as the furniture was liable to be distrained for the arrears due from the Plaintiff to his landlord, the Defendant was not bound to take them, and was therefore excused from the performance of the agreement.

Clayton took nothing by his motion.

(IN THE EXCHEQUER CHAMBER.)

Hague Gent. One, &c. *v.* French; in Error.

June 25th.

If a bill of exchange be made payable two months after date, and no date be expressed, the Court will intend it to be payable two months after the day on which it was made. The first count of a declaration stated that the Defendant heretofore, to wit, on such a day, drew a bill of exchange, bearing date the day and year aforesaid, payable two months after date. The second count stated that afterwards, to wit, on the day and year aforesaid, the Defendant drew a certain other bill of exchange, payable two months after date; without mentioning any express date in either count. Held that both counts were good.

Error from a judgment of the Court of King's Bench in an action of *assumpsit*, brought by the payee against the acceptor of a bill of exchange. The 1st count of the declaration stated that one *R. C.*, "heretofore, to wit, on the 15th day of *September* in the year of our Lord 1800, &c. according to the usage. &c. drew her certain bill of exchange in writing, bearing date the day and year aforesaid, and thereby required the Plaintiff in error to pay to the Defendant in error, two months after the date of the said bill, the sum of 19*l.* 18*s.* 7*d.*," and proceeded to allege acceptance by the Plaintiff in error, and his promise to pay. The 2d count was, "And whereas the said *R. C.* afterwards, to wit, on the same day and year aforesaid, at, &c. according to the usage, &c. made and drew her certain other bill of exchange in writing upon the said Plaintiff in error, and thereby required him to pay to the Defendant in in error, two months after date thereof, 19*l.* 18*s.* 7*d.* value received;" and then proceeded as the first count, averring acceptance of the bill by the Plaintiff in error; "to wit, on the same day and year aforesaid;" and his promise to pay. Upon this declaration there was judgment below by *nil dicit*, and a writ of inquiry executed; the Plaintiff in error, after assigning the general errors, proceeded thus: "That the damages have been assessed for and

adjudged

1802.
HAGUE v. FRENCH.

adjudged to the said Defendant in error upon the whole of the aforesaid declaration generally, whereas it appears in and by the record aforesaid that the second count of the said declaration was and is insufficient in law, and that no damages could or ought by law to have been assessed or adjudged to the said Defendant in error in respect thereof, or of the supposed promise and undertaking therein mentioned," praying in the usual form that the judgment might be reversed.

Barrow for the Plaintiff in error now objected that the second count of the declaration could not be sustained, inasmuch as no date to the bill was stated; for the bill being payable at two months, without a date, it was impossible to ascertain the time of payment; that although in *De la Courtier* v. *Bellamy*, 2 *Show*. 422. the Court held that it might be intended that the date of the bill was the day of the drawing, yet in that case the day on which the bill was drawn was expressly stated, whereas in the present case the day of the drawing was only to be collected from words of reference to the first count, where the day of drawing was laid under a *to wit*.

Lawes contrà was stopped by *the Court*, who were of opinion that the case was not distinguishable from *De la Courtier* v. *Bellamy*, and that they might well intend the date of the bill to have been the day of the drawing stated in the first count.

Judgment affirmed.

June 29th.

MACDONNELL *v.* MACDONNELL.

If a declaration in debt demand 2000 *l.* and contain several counts, each of which states a debt of 224 *l.* 7 *s.* 4½ *d.* and the Defendant plead thereto that he does not owe the said sum of 224 *l.* 7 *s.* 4½ *d.* the Plaintiff may sign judgment for want of a plea.

A DECLARATION in debt demanded 2000 *l.* and contained several counts, each of which stated a debt of 224 *l.* 7 *s.* 4½ *d.* The Defendant, after having obtained time to plead upon the usual terms of pleading issuably, put in a plea that the Defendant did not owe to the Plaintiff the said sum of 224 *l.* 7 *s.* 4½ *d.* concluding to the country; whereupon the Plaintiff signed judgment as for want of a plea.

Bayley Serjt. having obtained a rule to shew cause why this judgment should not be set aside,

Shepherd and *Marshall* Serjts. shewed cause, and urged that the plea must be considered as a nullity, since it clearly was no answer to the whole declaration, the amount of the debt claimed being 2000 *l.*; and as it was not pleaded to any particular count, it could

not be applied to any particular count. 1802.

Bayley on the other hand insisted, that although the plea were not a complete answer to the whole declaration, yet that the judgment ought not to have been signed for the whole sum mentioned in the declaration, but ought to have been taken for all except 224*l.* 7*s.* 4½*d.*, for that the plea might be taken to apply to the first count of the declaration.

MACDONNELL *v.* MACDONNELL.

But *The Court* were of opinion that as the plea was pleaded to the whole declaration it must be considered as no plea within the meaning of the Judges' order.

Rule discharged.

KENRICK *v.* Lord WM. BEAUCLERCK.

July 2d.

A. devised thus, "As to my real and personal estate, subject to my debts and funeral expences, I give and devise the same as follows, *viz.* my real estates, and also my personal estate, unto *J. M.* and *O. W.* and their heirs on the following trusts, *viz.* to the intent that they dispose of my personal estate in discharge of my debts, funeral expences, and such legacies as I may direct and as to my real estates, subject to my debts and such charges as I may make, I give and devise the same to *R. P.* for life. Held that under this devise the legal estate in the realty vested in *R. P.* for his life, and *J. M.* and *O. W.* took no estate therein.

THE following case was sent by the Lord Chancellor for the opinion of this Court:

Thelwall Price, late of *Bathafern Park* in the county of *Denbigh* Esq. being at the time of making his will hereinafter set forth, and at the time of his death, seised to him and his heirs of divers lands in the several counties of *Denbigh*, *Flint*, *Merioneth*, *Caernarvon*, and *Anglesea*, duly made and published his said last will and testament in writing, the material clauses of which were as follow; "And as to my real and personal estate whatsoever and wheresoever, subject to and chargeable with my just debts and funeral expences, I give, devise, bequeath, and dispose thereof as follows; that is to say, I give, devise, and bequeath my real estates, lands, tenements, and hereditaments in the several counties of *Denbigh*, *Flint*, *Merionethshire*, *Caernarvonshire*, and *Anglesea*, and elsewhere, and also all my personal estate, goods, chattels, and effects whatsoever unto *John Mostyn* of *Segroit* in the said county of *Denbigh* Esq. and *Owen Wynne* of *Crossnewydd* in the said county of *Denbigh* Esq. and their heirs, upon trust, and to and for the several uses, trusts, intents, and purposes following; that is to say, To the intent that the said *John Mostyn* and *Owen Wynne* and the survivor of them, and the heirs, executors, and administrators of such survivor, shall and do in the first place apply and dispose of my personal estate, or so much thereof as shall be sufficient for that

1802. KENRICK v. Lord W. BEAUCLERCK.

purpose, to and in payment of all my just debts and funeral expences, and to and in discharge of all such legacies as I may by this or any future will or codicil direct to be paid, and also in discharge of such expences as my trustees shall be at in discharging the trusts of this my will; and as to all my real estates whatsoever and wheresoever, subject to my debts and such charge and charges as I may now or at any time or times hereafter think proper to make, I give, devise, and bequeath the same unto my Cousin *Richard Price*, only son of *William Price* of *Rhewlas*, for and during the term of his natural life." He then entailed the estates, on the issue male and female of the said *Richard Price*, in strict settlement; and in default of such issue, devised them to the Rev. *Robert Carter* of *Redbourn* in the county of *Lincoln* for his life; and after his death to his issue male and female in strict settlement; and, in default of such issue, to *Richard Kenrick*, eldest son of *Andrew Kenrick*, of the city of *Chester* Esq. for and during the term of his natural life; and after his decease, to his issue male and female, in strict settlement, and added a proviso, that whoever should take the estates should bear the surname of *Thelwall*, and make the mansion-house at *Bathafern Park* their usual and common place of abode and residence; and on their refusal so to do, declared the above devise void, and bequeathed his estates to his own right heirs for ever.

The questions for the opinion of the Court were, 1st, Whether the trustees in the will of the testator *Thelwall Price* took any estate at law? 2dly, Whether the tenant for life took any estate at law?

Lens Serjt. for the Plaintiff. The question is, Whether any legal estate in the lands devised vested in the trustees? or, Whether the whole legal estate did not vest by the operation of the statute of uses in the *cestuy que trust*? The general principle of law may be admitted, that where trustees are interposed merely for the sake of interposing them, and they have nothing to do but what might be done by the *cestuy que trust*, such interposition is useless, and the statute vests the legal estate in the *cestuy que trust*. It was formerly said in the case of *Burchett* v. *Durdant*, 2 *Vent.* 312. that where lands were devised to *A.* in trust to permit and suffer *B.* to receive the rents and profits, the legal estate vested in *A.*, and *B.* held only a trust. But that case was afterwards over-ruled in *Broughton* v. *Langley*, 2 *Salk.* 679. 1 *Lutw.* 814: and indeed in *Burchett* v. *Durdant*,

 A. was

A. was created a trustee for no other purpose than that of receiving with one hand in order to pay over with the other. But where any thing is appointed to be done by the trustee beyond the mere receipt of the profits, the estate must remain in him for the purpose of enabling him to discharge the trust which the testator has directed that he and no one else shall execute. In this case the testator first expresses his intention to make the devise of his real and personal estate subject to and chargeable with his just debts and funeral expences, and then devises first his real estates and then his personal estates to trustees, directing the application of the personal estate to the payment of debts, funeral expences, and legacies, and then devises his real estates to the tenant for life, subject to his debts and such charges as he may make upon them. The devise to the trustees therefore, coupled with the first expressions of the will, imposes on them the duty of paying the debts, and consequently gives them the legal estate. However slight the object of the trust may be, it is sufficient that the testator has appointed the trustees as the persons to carry that object into execution: and the statute will not operate to vest the estate in the *cestuy que trusts* unless they would take precisely the same estate as the trustees. The estates indeed are given to the devisee, subject to the payment of debts: but until that payment has been made the estates do not vest in him. And though if the estates were immediately vested in him the Court of Chancery would make him a trustee for the payment, yet as the testator has thought proper to appoint other persons as trustees for that purpose, the legal estates must vest in them in order to enable them to execute that intention. In the case of *Bagshaw* v. *Spencer*, 1 *Vef.* 144. Lord *Hardwicke* laid great stress upon the whole fee being conveyed to the trustees by the word "heirs," in which respect, he said, it differed from other cases which he cited, where nothing but a chattel interest was conveyed to the trustees.. The case of *Shapland* v. *Smith*, 1 *Brown's Chan. Ca.* 75. is a strong authority to shew that where the trustees have any thing to do the legal estate will vest in them: for in that case the trustees, after deducting rates, taxes, and repairs, were to pay over the residue of the profits to the devisee for his life; and yet they were held to take a legal estate. So in *Silvester* d. *Law* v. *Wilson*, 2 *T. R.* 444. where the devise was to trustees in trust to receive the rents and profits during the life of *A.*, and that such rents and profits should be applied for the subsistence and maintenance of *A.* during his life, the trustees took a legal estate.

And

1802. KENRICK v. Lord W. BEAUCLERCK.

And in the case of *Doe* d. *Blake* v. *Luxton*, 6 *T. R.* 289. where all the trusts had been executed, and nothing remained to be done by the trustees, yet having once taken a legal estate, Lord *Kenyon* was of opinion that without a surrender of their estate the devisee could not maintain an ejectment.

Bayley Serjt. *contrà*. I do not dispute any of the cases which have been cited, but I deny their application to the case before the Court. It is clear that if it had appeared upon the face of this will that the trustees were directed to do any thing they must have taken a legal estate: but in this will there are no directions to that effect. The testator has not directed them to pay the debts out of the real estate: the payment of the debts is only made a charge upon the devisees. Where the testator intended that they should have any management of his property he has so expressed himself in precise terms; for, with respect to his personal estate, he expressly gives it to the trustees upon trust to pay his debts, legacies, and funeral expences. But in the disposition of his real estate he employs no words to shew that the trustees were to have the disposal of the profits.

Cur. adv. vult.

The opinion of the *Court* was this day delivered by

Lord ALVANLEY Ch. J. We have looked into the cases to see whether any thing was to be found to alter the opinion which we formed upon the argument. But those cases all tend to shew that the question upon which the present case must depend is this, *viz.* Whether sufficient appears upon the face of this will to demonstrate an intention in the testator that the trustees should pay the debts? The cases are very accurately stated in my Brother *Williams*'s edition of *Saunders*, in a note to *Jeffreson* v. *Morton* (a), and I cannot lay down the principle in better terms than he has used. He states the rule by which it is to be decided whether the estate be an use executed or a trust, in these words; "Where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate." The case of *Doe* d. *Blake* v. *Luxton* affords no argument in favour of the Plaintiffs in this case; for it was necessary there

(a) 2 *Saund.* p. 11. n. 17.

 that

that the truftees fhould take a legal eftate for the purpofe of executing the trufts; and the fame may be faid of *Harton* v. *Harton*, 7 *T. R.* 652. where the eftate was limited to truftees upon truft to permit three married women fucceffively to take the rents and profits. In the latter cafe Lord *Kenyon* fays, that *Jones* v. Lord *Say and Seal* 8 *Vin. Abr.* 262. is a cafe by itfelf, by which I fuppofe he means that it is a doubtful cafe, though he admits that it had been recognifed to be law by Lord *Hardwicke* in *Bagfhaw* v. *Spencer*. And indeed that cafe tends to fhew that even where fomething might remain to be done by the truftees the eftate might be executed in the devifee: for it was held that by the words of the will the ufe was executed in the truftees and their heirs during the life of the feme covert, and after her death it was executed in the perfons entitled to take, charged with the annuities. The other cafes of *Shapland* v. *Smith* and *Silvefter* d. *Law* v. *Wilfon*, only illuftrate the principle ftated in my Brother *Williams*'s note. Unlefs therefore it appears manifeftly that the teftator intended that the truftees fhould be active in paying the debts, the legal eftate will not veft in them. The queftion is, Whether there be any fuch apparent intention on the face of this will? It would indeed be much more convenient that the legal eftate fhould be vefted in truftees for the payment of the debts than that the truft fhould be executed by the devifee, under the direction of a court of equity; for a court of equity could not enable the devifee to make a complete title to the eftate: But this is only an argument *ab inconvenienti*, from which we cannot conftrue the teftator to have faid what in fact he has not faid. Perhaps if it had been fuggefted to him he would have directed that the payment fhould be made by the truftees; but he has not done fo. This is a mere devife charged with the payment of debts. In difpofing of the perfonal eftate the teftator directs the truftees to pay his debts, legacies, and funeral expences; but in the limitation of the real eftate he does not even fay *after* payment of his debts and fuch charges as he fhall make, to the ufe of the tenant for life, but *fubject* to his debts and fuch charges as he fhall make. Upon thefe grounds we are all of opinion, and fhall fo certify, that the truftees took no legal eftate in the premifes, but that *Richard Price* took an eftate at law for life, charged with the payment of debts.

v. Lord W. Beauclerck.

The following certificate was fent to the Lord Chancellor.

This cafe has been argued before us, and we are of opinion that the truftees named in the will of *Thelwall Price* did not take any eftate at law in the real eftates devifed by the faid will.

We are also of opinion, that *Richard Price*, the tenant for life, took a legal estate in the said real estates.

ALVANLEY.
T. HEATH.
G. ROOKE.
A. CHAMBRE.

June 30th.

DECKER *v.* SHEDDEN.

A summons for further time to plead, not attended by the party taking it out, does not wave the necessity of a rule to plead.

IN this case a declaration *de bene esse* was delivered to the Defendant's attorney on the 13th of *May*, and on the same day a rule to plead was given, which was by mistake entered in the *King's Bench* instead of this Court; on the 17th of *May* the Defendant entered an appearance, and a plea was demanded; on the same day the Defendant took out a summons for further time to plead, but did not attend at the return of the summons; on the 20th of *May* the Plaintiff signed judgment for want of a plea.

To set aside this judgment for irregularity, inasmuch as the Defendant had not been properly ruled to plead, a rule *nisi* was obtained on a former day (*a*).

Shepherd and *Lens* Serjts. now shewed cause and insisted that the irregularity complained of had been waved by the Defendant's taking out a summons for further time to plead, and cited *Towers* v. *Powel*, 1 *H. Bl.* 87. where a Plaintiff having obtained time to declare, the Court held a rule to declare unnecessary in order to support a judgment of *non pros;* that rules to plead are only given in order to apprize the Defendant when he is to plead, and that a Defendant by praying time to plead excludes any presumption that he is not aware of the time at which he ought to plead. *Starkie* v. *Wilkes*, *Mich.* 7 *Geo.* 2. *B. R.* 1 *Cromp. Pr.* 162.; and that although an order was obtained in that case, yet the principle applies equally to cases where a summons only is taken out as to the cases where an order is made; and that it appeared from *Rivers* v. *Plumbe*, *Barnes*, 240. ed. 3. and *Brown* v. *Godfrey*, *Cooke's Cas. Pr.* 144. that a summons when returnable was formerly so far an effectual proceeding, that if not attended by the party taking it out, the other side could not sign judgment without having previously discharged the summons. [But *The Court* said that was wholly unnecessary at the present day.]

(*a*) This matter had been before the Court in the preceding term, when the rule was discharged, it being rather understood at that time that in *Towers* v. *Powel* there had been no order. But in this term *Best* Serjt. stated to the Court the mistake alluded to, and obtained leave to bring the matter before the Court again.

Best

Best Serjt. in support of the rule urged, that a mere summons for further time to plead not attended by the party taking it out was no waver, and that on this ground the present case was distinguishable from *Towers* v. *Powel*.

The Court were of opinion that the summons for time to plead did not wave the necessity of a rule to plead, that summons not having been followed up by an order.

Rule absolute.

ELLIOT *v.* EDWARDS.

July 5th.

A. having sold certain leasehold premises to *B.*, assigned them by indenture, containing a proviso that *B.* should not assign over until the whole of the purchase-money should have been paid, and *B.* and *C.* covenanted for themselves, their executors, administrators, and assigns for the payment of the money. The premises having been taken in execution for a debt of *B.*, who had not paid the purchase-money, were sold by the sheriff to *D.*, who paid down a deposit and agreed to complete the purchase on having a good title. Held that the non-payment of the purchase-money by *B.* was a sufficient objection to the title, and that *D.* might recover back his deposit in an action for money had and received.

THIS was an action for money had and received, and was brought to recover from the Defendant as auctioneer the sum of 45*l.* being the amount of a deposit paid into his hands by the Plaintiff on the purchase of a leasehold estate.

The cause was tried at the *Guildhall* Sittings in this term before Mr. Justice *Chambre*, when a verdict was found for the Plaintiff, with liberty to the Defendant to apply to the Court to have a nonsuit entered. The facts of the case were as follow: *William Emblin* being possessed of a lease of certain premises wherein he carried on a school, agreed with *Morgan William Johnes* for the sale of the said lease, together with the good-will of the school for 1000*l.* and certain goods and fixtures upon the premises to be paid for according to valuation. It was agreed that the said 1000*l.* together with the amount of the valuation of the said goods and fixtures, should form an aggregate sum to be paid and secured by the said *M. W. Johnes* to the said *William Emblin*, and that on payment of 500*l.* part thereof on the 25th of *December* then next, possession of the lease and premises, goods, fixtures, and effects, should be delivered up and absolutely assigned to the said *M. W. Johnes*. By indenture of the 7th of *January* 1801, between *William Emblin* of the first part, *M. W. Johnes* of the second part, and *Matthias Pierce* of the third part, reciting the original lease to *William Emblin*, and the said agreement, and that the goods and fixtures had been valued at 390*l.* and that 500*l.* had been paid in pursuance of the said agreement by the said *M. W. Johnes* to the said *William Emblin*, the said *William Emblin* assigned over the goods and fixtures absolutely, and the leasehold premises for the remainder of the term, subject to the rents, covenants, con-

1802. ELLIOT v. EDWARDS.

ditions, and agreements therein expressed and contained. The indenture contained the following proviso: "Provided always, and these presents are upon this condition nevertheless, that he the said *M. W. Johnes*, his executors and administrators, shall not nor will at any time or times hereafter (until the money agreed to be paid and secured unto the said *William Emblin*, his executors, administrators, and assigns, by the said *M. W. Johnes*, his executors and administrators, amounting to 890*l.* for the good-will and purchase of the said goods and fixtures in the said recited agreement contained, be paid and satisfied to the said *William Emblin*, his executors, administrators, and assigns, and for the due payment of which the said *M. Pierce* is the surety of the said *M. W. Johnes*) underlet, lease, assign, transfer, or set over unto any person or persons for all or any part of the said term in the said recited indenture of lease mentioned, all or any part of the said premises hereby assigned, without the joint licence and consent of them the said *William Emblin* and *Matthias Pierce*, in writing under their hands first had and obtained." The indenture also contained a covenant on the part of *M. W. Johnes* and *Matthias Pierce*, for themselves, their executors, administrators, and assigns, for the payment of the remaining sum of 890*l.* by instalments of 100*l.* each, on every successive *Midsummer* and *Christmas* day, and 90*l.* on the last instalment, with a proviso, that *Matthias Pierce* should not be called upon until after two months' notice of the default of *M. W. Johnes.* The leasehold premises above mentioned having been taken in execution under a *fieri facias* for a debt due from the said *M. W. Johnes* to Messrs. *Smith* and Co. of 641*l.* 12*s.* were put up to sale by public auction on the 13th of *January* 1802. Among the terms of sale was contained an article, that the purchaser should pay down immediately a deposit of 20*l. per cent.* in part of the purchase money, and sign an agreement for payment of the remainder on or before the 2d of *February* 1802, on having a good title, when possession would be given. The Plaintiff became the purchaser at such sale for the sum of 260*l.* and paid a deposit of 45*l.* But afterwards objecting to the title, refused to complete the purchase, and brought this action to recover the deposit.

Shepherd Serjt. now moved for a rule *nisi* for entering a nonsuit. Two objections have been made to the title; 1st, That the sheriff was not entitled to assign the lease on account of the proviso restraining *Johnes* and his assigns from transferring or assigning

 without

without the joint licence of *William Emblin* and *Matthias Pierce*, and 2dly, That if the Plaintiff should complete his purchase and take an assignment of the premises, he would be liable by the covenant in the deed as assignee of *M. W. Johnes* to make good to *William Emblin* the remaining instalments yet unpaid. The case of *Doe* d. *Mitchenson* v. *Carter*, 8 *T. R.* 57. puts an end to the first objection, it having been there expressly decided, that a sale of leasehold premises under an execution did not fall within the terms of a proviso against assigning, because it was a proceeding *in invitum*. And whether the proviso be not to assign generally, or not to assign until a particular event shall have happened, the operation of law is the same. With respect to the second objection, the covenant of *M. W. Johnes* and *Matthias Pierce* is not a covenant running with the land, but is a covenant in gross, and merely binding upon them personally. It is true that the covenant contains the word "assigns," and that there are cases where the assignee will be bound by that word, though he will not without it. But it is manifest in the present case, that the word "assigns" could never have been intended to describe the assignees of the premises in question; for the covenant is joint, and the word "assigns" applies equally to *M. W. Jones* and to *Matthias Pierce*; but as the latter had no interest whatever in these premises, his assigns could never be the assignees of these premises. Nor does the covenant create any equitable lien on the premises. The parties, if they had thought proper, might have secured the instalments by a mortgage, but not having done so, they cannot make the assignees of the sheriff liable to the payment of those instalments.

Lord Alvanley Ch. J. If the purchaser would be liable in equity it is a sufficient objection. Suppose a man, having purchased an estate, assign it before the purchase-money has been paid, a court of equity will compel the assignee to pay that money, provided he knew at the time of the assignment that it had not been paid. Here *Johnes* obtained an assignment in consideration of an undertaking to pay for the lease and fixtures; that consideration money has not been paid. *Johnes* and *Pierce* for themselves and their assigns covenant for the payment of that money: and there is a proviso that *Johnes* shall not assign, until that money has been paid, without the consent of *Emblin* and *Pierce*. Does not that create an equitable incumbrance? I think that a court of equity would hold

1802.
ELLIOT v. EDWARDS.

hold it so, though I do not know that it would be binding at law. Now what is the nature of the Plaintiff's deposit? Is it not made upon the condition that the purchase shall be completed free from all reasonable objections? It is quite clear that a court of equity would not compel a specific performance of the agreement for the purchase of these premises. If a bill were filed for that purpose it would be dismissed with costs. I think that the Plaintiff has made out a reasonable objection to the title offered by the Defendant, and consequently must recover his deposit.

HEATH, ROOKE, and CHAMBRE Js. concurring,

Shepherd took nothing by his motion.

July 3d.

CONSTANTINE v. PUGH.

If a note for payment of the allowance to a prisoner under the Lord's Act be dated on a Saturday and delivered on a Monday, and contain a general promise to pay the allowance weekly, the prisoner is entitled to be discharged. *Qu.* Whether such a note ought not to contain an express promise to pay the allowance on a Monday, although it be dated on that day of the week.

THE Defendant, who was a prisoner in execution, having been brought up under the Lords' Act (*a*), and remanded on receiving a note from the Plaintiff for the payment of 3*s.* 6*d.* *per* week, obtained a rule to shew cause why he should not be discharged, on the ground of the note not being conformable to the directions of *s.* 13. of the act.

The note in question was delivered to the Defendant on *Monday* the 21st of *June*, and was as follows:

"*Richard Constantine* v. *David Pugh*.

"I hereby promise to pay and allow to *David Pugh* the sum of three shillings and sixpence *per* week weekly for so long time as he shall continue in prison in execution at my suit. As witness my hand this 19th day of *June* 1802.

(Signed) *Richard Constantine*."

Best Serjt. when he obtained the rule, insisted that by the words of the act the creditor is required to "agree by writing, signed with his name or that of his attorney, to pay and allow weekly a sum not exceeding two shillings and four-pence unto the said prisoner, to be paid every *Monday* in every week, so long as any such prisoner shall continue in execution;" the present note being dated on the 19th of *June*, which was a *Saturday*, and not being expressed to be payable on any other day, it must be taken to be

(*a*) 32 *Geo.* 2. c. 28.

payable

payable on every *Saturday*, and consequently did not comply with the provisions of the act. He cited *Lench* v. *Pargiter*, *Doug.* 68.

1802.

CONSTANTINE v. PUGH

Clayton Serjt. now shewed cause, and observed that the present case was distinguishable from that of *Lench* v. *Pargiter*, since the note was there expressed to be payable on every *Wednesday*, whereas in this case it was expressed generally to be payable weekly, and must be taken to be payable from the day on which it was delivered, *viz.* *Monday* the 21st.

But Lord ALVANLEY Ch. J. said, We are of opinion that this objection is fatal. Had this note been dated on *Monday* the 21st, I should have thought it sufficient: though my Brothers are of opinion that it ought to be expressed in the note that it is payable on a *Monday*, and that unless it be so expressed the note will not be good.

Per Curiam, Rule absolute.

EDMONSON *v.* PARKER.

July 7th.

The Defendant having given a warrant of attorney to confess judgment, took the benefit of an insolvent act, then became bankrupt and obtained his certificate; after which the Plaintiff entered up a general judgment and sued out a general execution. Held regular, no dividend appearing to have been made.

THIS was an application to set aside a judgment, and writ of *fieri facias* issued thereon, for irregularity. It appeared by the affidavit of the Defendant that in 1793 he gave a warrant of attorney to confess judgment to the Plaintiff, soon after which he became a prisoner in the *Fleet*, and took the benefit of an insolvent act, which passed in 1794; that he then entered into business again, and on the 8th of *January* 1801 became a bankrupt, and on 28th *April* in the same year obtained his certificate; that after this the Plaintiff entered up a general judgment on the warrant of attorney given in 1793, and sued out a general writ of *fieri facias* thereon, under which the Defendant's goods, to the amount of 41 *l.* 3 *s.* 9 *d.* were levied on the 1st of *July* 1802. No dividend appeared to have been made under the commission of bankrupt.

Best Serjt., in support of the rule, referred to the 5 *Geo.* 2. *c.* 30. *s.* 9. which directs that a certificate obtained by any person under a commission of bankrupt, who has before been discharged under an insolvent act, shall only discharge his person from arrest, but that the future estate and effects of such person shall remain liable to his creditors as before the making of the act (the tools of trade, the necessary household goods and furniture, and necessary wearing apparel of such bankrupt and his wife and children only excepted),

 unless

1802.
EDMONSON v. PARKER.

unlefs the eftate of fuch perfon againft whom fuch commiffion fhall be awarded fhall produce, clear after all charges, fufficient to to pay every creditor under the faid commiffion, 15 *s.* in the pound for their refpective debts. Under this act he infifted that the judgment and writ of execution were irregular: fince none of the effects of the Defendant would be liable to fatisfy the Plaintiff's debt, if the eftate had produced 15 *s.* in the pound; and at all events the tools of trade furniture and clothes were exempt; that the judgment therefore ought to have been entered fpecially with reference to thefe exceptions, for which purpofe the Plaintiff fhould have fued out a *fcire facias*, averring that the eftate had not produced 15 *s.* in the pound. He cited *Buxton* v. *Mardin*, 1 *T. R.* 80. in which a general judgment having been entered up after the Defendant's difcharge under an infolvent act, upon a warrant of attorney given before, the Plaintiff fued out a fpecial writ of execution, referring to the exceptions contained in the act; and Lord *Mansfield* faid, "It is clear the judgment is wrong, as it cannot be entered up generally fince the act, without giving the Defendant an opportunity of pleading in difcharge of his perfon;" and *Buller* J. faid, "The ftatute has given a defence as to his perfon and wearing apparel, &c., and that muft be put upon record before judgment." He alfo cited *Gill* v. *Scrivens*, 7 *T. R.* 27. where the Plaintiff having entered up a judgment againft the Defendant and taken his body in execution after one bankruptcy, the Defendant was difcharged by a certificate under a fecond bankruptcy, whereupon the Plaintiff fued out a *fcire facias* to have execution againft his goods, which was held bad upon demurrer for want of a fufficient averment that the eftate had not produced 15 *s.* in the pound.

Shepherd Serjt., againft the rule, infifted that as the judgment had purfued the warrant, and the execution had purfued the judgment, they were both regular. He admitted that in *Buxton* v. *Mardin* the proceedings were irregular, becaufe the execution had not purfued the judgment, for a general judgment will not warrant a fpecial writ of execution: that in *Gill* v. *Scrivens* fome *fcire facias* was neceffary, fince the judgment, being more than a year old, it could not be revived without a *fcire facias*; and as the judgment was entered up and the body taken in execution between the two bankruptcies, the Plaintiff could not have execution againft the goods, without ftating thofe circumftances which deprived the Defendant of the benefit of his certificate, and therefore he was

bound to ſtate the exception, which was contained in the ſame clauſe with that under which he claimed. But he urged that in the preſent caſe no *ſcire facias* was neceſſary to authoriſe either the judgment or execution.

Lord ALVANLEY Ch. J. The Defendant in this caſe complains of a judgment which is regular upon the face of it: but he alleges, that from ſome circumſtances which do not appear upon the record, the Plaintiff is not entitled to execution except under certain reſtrictions and limitations. The warrant of attorney is in the common form, authorizing the party to confeſs a general judgment: and the act of Parliament does not require that under theſe circumſtances any ſpecial judgment ſhould be entered. The Defendant therefore, ought to ſhew that he has been injured by an execution executed. If he could ſhew that his eſtate had produced 15 *s.* in the pound, or that his tools, furniture, or clothes had been taken, the Court would grant relief; but the proof of theſe matters lies on him. In the caſe of *Gill* v. *Scrivens* the Defendant's perſon had been diſcharged, and it became neceſſary to ſue out a ſpecial execution under the act of Parliament, which could not be obtained without a *ſcire facias* ſtating all the circumſtances, which would bring the Defendant within the act, and negativing all exceptions contained in the enacting clauſe. But I do not know that the Plaintiff would be bound to prove that negative (*a*).

HEATH J. Little reliance can be placed on the caſe of *Buxton* v. *Mardin*, when we obſerve that it concludes with a recommendation from the Court to the Defendant not to object to the mode of proceeding which had been ſuggeſted. The queſtion in this caſe is, Whether the evidence ſtated on the Defendant's affidavit would have been ſufficient to have entitled him to an *auditâ querelâ?* A ſpecial judgment would not have been authorized by the warrant of attorney. The complaint muſt therefore be, that the

(*a*) This ſeems alſo to have been the opinion of Mr. Juſtice *Buller* and Mr. Juſtice *Heath*. See *Jelfs* v. *Ballard*, *ante*, vol 1. p. 468. 469. That was an action of *aſſumpſit*, to which the bankruptcy and certificate of the Defendant were pleaded, and it appearing that the Defendant had been twice a bankrupt, and that the cauſe of action occurred between the firſt and ſecond bankruptcy, the Court inclined to hold it unneceſſary for the Plaintiff to ſhew that the Defendant's eſtate would not produce 15 *s.* in the pound under the ſecond bankruptcy, although the action was commenced before any dividend had been made, and before the period allowed by 5 *Geo.* 2. *c.* 30. *ſ.* 37. for making the dividend had elapſed.

1802. EDMONSON v. PARKER.

writ of execution ought to have been limited. It is not suggested that the execution has been improperly executed, or that more has been taken than might have been taken under a special execution. Now it appears to me that the *gravamen* in an *auditâ querelâ* must have been that something had been improperly taken. And if relief could not have been granted on an *auditâ querelâ*, neither can it on motion.

ROOKE J. The judgment in this case pursues the warrant of attorney, and the execution pursues the judgment. Both therefore appear to me to be correct. The only ground of application to the Court must be, that the execution has been executed contrary to the 5 *Geo.* 2. But it appears that no dividend has been made: then how can the Defendant be entitled to set the execution aside. It is not pretended that any of the articles protected by the statute have been taken: had any such matter appeared, it might have afforded ground for particular relief.

CHAMBRE J. I do not see how the Plaintiff could have acted otherwise than he has done. On a general warrant of attorney he could only enter up a general judgment. No one ever heard of a *scire facias* upon a warrant of attorney. Then the execution must follow the judgment. It was agreed by the Court of King's Bench in *Buxton* v. *Mardin*, that a special execution on a general judgment was bad. If the Plaintiff takes more under the execution than he is entitled to, the Defendant must make a special application on special grounds, the proof of which must lie on him. I do not think this decision inconsistent with the case of *Buxton* v. *Mardin*.

Rule discharged.

July 7th.

SALTE and Others, Assignees of STOCK a Bankrupt, *v.* THOMAS.

The prison-books of the *Fleet* and *King's Bench* prisons, tho' admissible evidence to prove the period of the commitment and discharge of a prisoner, are not admissible to prove the cause of his commitment.

THIS was an action by the Plaintiffs, as assignees, upon two bills of exchange drawn by the bankrupt and accepted by the Defendant. The cause was tried before *Chambre* J. at the *Guildhall* Sittings in this Term, when the Plaintiffs, in order to prove that the bankrupt had committed an act of bankruptcy by lying two

months in prison for debt, produced the books of the *Fleet* and *King's Bench* prisons to establish that fact. These books contained entries of the dates of the commitments and discharges of all the prisoners, together with particulars of the causes of each commitment extracted from the original warrants. From these books it appeared that the bankrupt had been committed to the *Fleet* for debt, and had been removed from thence to the *King's Bench* prison, charged as well with the action in the Common Pleas as with several other actions in the King's Bench, and that he had altogether lain in prison above two months. On the part of the Defendant it was objected that though the prison-books were admissible in evidence to prove the period of the commitment and discharge, yet they were not admissible to prove the cause of the commitment, but that the original warrants should have been produced. The learned Judge admitted the evidence, reserving the point, and a verdict was found for the Plaintiffs.

Bayley Serjt. having on a former day obtained a rule *nisi* for setting aside the verdict and having a new trial,

Shepherd and *Best* Serjts. shewed cause, and contended that as it appeared from the case of *The King* v. *Aickles*, *Leach. C. C.* 435. ed. 3. that the daily books of a prison are admissible to prove the time at which a prisoner is discharged, it must necessarily follow that if they are admissible to prove any of the facts which they contain, they are admissible to prove all the facts which they contain; for that the admissibility of the books did not depend upon the question, Whether better evidence of the facts contained in them might or might not be produced, since the parole evidence of the turnkey would be better evidence of the period of the commitment and discharge than the books themselves, but on the ground that the books were documents of sufficient credit to establish their contents.

Marshall (*a*) Serjt., in support of the rule, insisted that the case of *The King* v. *Aickles* only decided that the books of a prison are admissible to shew the time of the prisoner's commitment and discharge, and that the general rule of law being that the best evidence of a fact must be produced, the Court would not hold abstracts of the warrants of commitment, introduced into the public documents of the prison, as to the time of commitment and discharge, to

(*a*) In the absence of Mr. Serjt. *Bayley*.

1802.

SALTE v. THOMAS.

be thereby made as good evidence as the warrants of commitment themselves; for such a decision would be making a copy of an instrument taken by a public officer evidence, when if taken by a private individual it would clearly not be evidence.

Cur. adv. vult.

The opinion of the Court was now delivered by

Lord ALVANLEY Ch. J. The question in this case is, Whether the evidence produced was sufficient to prove a fact necessary to constitute the act of bankruptcy, *viz.* that the bankrupt had lain two months in prison on civil process for debt. For this purpose the prison books were produced, from which it appeared that the bankrupt had lain the necessary time in prison; but it was objected, that though the books were evidence of the time of the bankrupt's imprisonment, they were not evidence of the cause of the commitment, and that they were not equivalent to the *committitur* itself, which was admitted to be in existence. To establish the sufficiency of the evidence the case of The King v. *Aickles* was cited, by which it appeared that in a criminal case, where it was material to prove the particular time of a prisoner's discharge, the book of *Newgate* was held to be sufficient for that purpose. That was a book kept by a public officer for the purpose of entering the transactions of the prison, the names of the prisoners, and the times of their discharge, which entries were sometimes made from the information of the turnkeys and sometimes from their indorsements on the warrants. The book was a complete history of the transactions of the prison, and as such it was held to be evidence of the day on which the prisoner was discharged. But the material distinction between that case and the present is, that there was no document of the fact which was proved by the book of *Newgate* but the book itself, and no other evidence could have been resorted to except the parole testimony of the turnkey who might happen to be in the prison at the time of the prisoner's discharge. But in the present case the *committitur* from which the entry was inserted in the book is in existence, and the question is, Whether that be not better evidence than the book itself? I am of opinion, and my Brothers concur with me in thinking that it was better evidence, and that the books therefore ought not to have been admitted. It has been said that these were in the nature of public books; but it was not contended, that they were that sort of public document, a copy of which might be given in evidence, like a parish register

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made under public authority. The two documents do not therefore appear to me of a similar nature, for the gaoler is not required by law to keep these prison books, but they are only kept for his own information and security. We do not therefore think this case governed by the case of *The King* v. *Aickles*; but we are of opinion that the *committitur* ought to have been produced to establish the cause of the commitment, and consequently that there must be a new trial.

Rule absolute.

FURTADO *v.* RODGERS.

July 7th.

An insurance effected in *Great Britain* on a *French* ship previous to the commencement of hostilities between *Great Britain* and *France* does not cover a loss by *British* capture.

ASSUMPSIT on a policy of insurance.

The declaration, after setting out a policy of insurance in the usual form, dated the 19th of *October* 1792, on the ship *Petronelli*, "at and from *Bayonne* to *Martinique*, and at and from thence to return to *Bayonne*," and making all the necessary averments, stated the loss in these words: "And the said *Joseph Furtado* further says, that afterwards and after the said ship had so arrived at *Martinique* aforesaid, in the said writing or policy of assurance mentioned, and whilst she remained there and before her departure from thence, in further prosecution of her said voyage, to return to *Bayonne* aforesaid, to wit, on the 12th day of *November*, in the year of our Lord 1793, the said island of *Martinique* was, with force and arms, and in an hostile manner, attacked, captured, and taken by the forces of our present Sovereign Lord the now King, then being at enmity and open war with the said island and the persons exercising the powers of government in the same; and the said ship then and there being at the same island as aforesaid, then and there on the capture of the same, was then and there seized, taken, and captured by the said forces of our said Lord the King, as a prize, and thereby the same ship, with all her tackle, apparel, ordnance, munition, boat, and other furniture thereof, became and was totally lost to the said *Joseph Furtado*, to wit, at *London* aforesaid, in the parish and ward aforesaid." The Defendant having pleaded the general issue, the cause was tried before Lord *Alvanley* Ch. J. at the first sittings in this term, when a verdict was found for the Plaintiff, subject to the opinion of the Court upon the following case.

1802.
FURTADO v. RODGERS.

The Plaintiff was owner of the ship at the time of the insurance, and from thence until the time of the loss hereinafter mentioned. The ship sailed upon the voyage insured in *October* 1792, and arrived at *Martinique* in *November* following; she remained there until *March* 1794, but her remaining there was justified by necessity; and war having broken out between this kingdom and *France*, she was then, upon the capture of the island of *Martinique* by the *British* forces, taken by them as a prize, with 40 other *French* vessels. The Plaintiff at the time the policy was effected, and from thence until the action was commenced, was a *French* subject, and resident at *Bayonne*, in *France*, which country was in amity with *Great Britain* when the policy was effected, and until the month of *February* 1793, at which time hostilities commenced between *England* and *France*. On the 10th *March* 1796, his Majesty granted a licence to Messrs. *Alves*, *Rebello*, and Co. authorizing them to receive from the underwriters on this policy the money for which they had subscribed, and this action was brought under directions from Messrs. *Alves*, *Rebello*, and Co. the Plaintiff's agents.

The question for the opinion of the Court was, Whether the Plaintiff was entitled to recover in this action? If the Court should be of opinion that he was, a verdict was to be entered for the Plaintiff; and the Court should think that the objection to the Plaintiff's recovery appeared upon the declaration, so as to entitle the Defendant to the full benefit of it upon a motion in arrest of judgment, the verdict was to be entered for the Plaintiff, and the Defendant was to make such application; but if the Court should be of opinion that the Plaintiff was not entitled to recover, and that the objection did not appear upon the record so as to entitle the Defendant to such benefit, then a nonsuit was to be entered.

Bayley, Serjt., for the Plaintiff. The question is, Whether after the cessation of hostilities between *England* and *France*, a *Frenchman* be entitled to recover in the *English* Courts upon a policy of insurance effected in *England* before the commencement of hostilities for a loss by *British* capture during the war? 1st, The authorities are decisive in the Plaintiff's favour. In *Planche* v. *Fletcher*, *Doug.* 251. the policy, which was on *French* account, was subscribed on the 7th of *July* 1778, and the proclamation for reprisals on the *French* was dated the 29th of the same month, after which the ship was captured by a King's cutter: Lord *Mansfield* said, "It is indifferent whether the goods were *English* or *French*; the risk extends

tends to all captures." The cases of *Eden* v. *Parkinson*, *Doug*. 732., and *Bermon* v. *Woodbridge*, *Doug*. 781., and *Plantamour* v. *Staples*, 1 *T. R*. 611. *in notis*, which also occurred in the time of Lord *Mansfield*, were of the same nature, and the Plaintiffs were allowed to recover. To these may be added the case of *Tyson* v. *Gurney*, 3 *T. R*. 477., which arose in the time of Lord *Kenyon*. That was an insurance by *American* loyalists effected on a *Dutch* ship before the commencement of hostilities between *Great Britain* and *Holland*; the loss accrued by *British* capture; and the Plaintiff recovered. These cases include a period of twelve years from 1778 to 1790: and though it does not appear that the objection now made was expressly raised, yet as all the cases afforded ground for the objection, it must be presumed to have been the understanding of the profession that such an objection could not have been made with success. After such a series of decisions countenancing these insurances, it may be questioned how far it would be consistent with good faith to foreigners to declare them to be illegal. Certainly it is not consistent with good policy to come to a decision which must have the effect of driving all foreign insurances from this country, since no foreigner will think it safe to effect an insurance here, when he knows that in the event of a war breaking out between this country and his own, his insurance will be rendered unavailable. The cases of *Brandon* v. *Nesbitt*, 6 *T. R*. 23., and *Bristow* v. *Towers*, 6 *T. R*. 35., having been determined on the ground of alienage, can afford no assistance to this Defendant: but as it appeared in the latter that the loss was occasioned by *British* capture, and the Court did not decide it at all upon that ground, it affords an additional reason for supposing, that even at that time it was not thought a sufficient objection. The case of *Potts* v. *Bell*, 8 *T. R*. 548. will not affect the present question; the insurance there having been effected on a trading with the enemy, which being illegal itself renders the insurance illegal also; though if such trading be sanctioned by the King's licence, the insurance will be legalized. *Vandyck* v. *Whitmore*, 1 *East*, 475. Many authorities therefore may be cited in the Plaintiff's favour, and none are to be found against him. But 2dly, It will be contended that it is contrary to sound policy to allow insurances by which the enemy may be indemnified against the acts of the *British* Government at the expence of *British* subjects. To this it may be answered that during the continuance of the war the foreigner can derive no benefit from his contract. So long as his

1802.
FURTADO
v.
RODGERS.

recovering would tend to defeat the objects of the *British* Government, by supplying the coffers or encouraging the commerce of its enemies, he is disabled from maintaining an action by his character of alien enemy. Nor can he calculate with any certainty upon recovering at the restoration of peace, so as to found any commercial speculations upon such expectation. For by the law of *England*, all the property of alien enemies, including their debts, is vested in the crown: and upon office found the King is entitled to reap the benefit of all contracts made for their advantage. The *Attorney General* v. *Weedon*, *Parker Rep.* 267. After the cessation of hostilities therefore the foreigner will not be able to avail himself of his indemnity, unless the Crown neglect to insist upon its rights: in which case it must be presumed that his recovering is not inconsistent with the policy of the state, in the same manner as that presumption authorizes an alien enemy to recover even during the war, where he has obtained the King's licence for that purpose. It may be remarked that in the 13 *Geo.* 2. (*a*) an attempt was made to introduce an act of Parliament to prohibit insurances on enemies' property without success. An act however to this effect passed in the 21 *Geo.* 2. (*b*), and another in the 33 *Geo.* 3. (*c*); both which were temporary acts imposing penalties and enacting that such insurances should be void. Had they been void at common law, such enactments would have been superfluous; at least a declaratory clause might have been sufficient.

Best Serjt. for the Defendant. With respect to the cases which have been cited it may be sufficient to observe, that the question which now stands for the determination of the Court, did not arise in any of them. Indeed it was then pretty generally understood that the property of an enemy might be insured *flagrante bello*: consequently no dispute could have arisen upon a policy like the present. It is a general principle of law that whatever militates against the interest of the state is contrary to law; the law being made for the protection of the public. No contract therefore, which is prejudicial to morals, to the revenue, or to any civil establishment can be enforced in a court of justice. Upon the same principle the law will not lend its aid to a contract which gives to one of the contracting parties an interest contrary to the interest of the state. In *Foster* v. *Thackeray*, 1 *T. R.* 57. *in notis*, an action was brought on a wager that war would be declared

(*a*) See 6 *T. R.* 42. (*b*) *C.* 4. (*c*) *C.* 27. *f.* 4.

 with

1802.

FURTADO v. RODGERS.

with *France* in three months; and though the case was never finally decided, yet it appears from the expressions of Mr. Justice *Buller* in *Good* v. *Elliott*, 3 *T. R.* 701. 702. that a great majority of the Judges were against the action, and he considers it as a case of great authority. And in a case subsequent to *Foster* v. *Thackeray*, *viz. Atherfold* v. *Beard*, 2 *T. R.* 610. the Court refused to enforce a wager respecting the amount of the hop duties, considering it contrary to the policy of the state to admit the public discussion of the subject to which the wages related. And it seems to have been the opinion of all the Judges in *Good* v. *Elliott*, 3 *T. R.* 693. that wagers which are against the sound policy of the kingdom, and tend to make the party a bad subject are void. Possibly the insurance of enemies' property during war, in a commercial view may be advantageous, but in a political view it is highly dangerous. It has been supposed however, that information has been obtained for government through the medium of *Lloyd's* Coffee-House: but it seems rather too much to expect that those who are most interested in the security of the enemy's ships should be very ready to give information through which they may be destroyed. The interest of the underwriters certainly leads them to give information to the enemy of the destination of our own cruisers, and whether they may at any time have been induced to do so, it is at least contrary to all sound policy to suffer the inducement to exist. The effect of such policies of insurance is to defeat the great objects of war. For in proportion to the exertions of the country will be the loss sustained by the enemy: and yet if enemies' property be insured here, those exertions of the government will be directed against its own subjects. One object of war is to destroy the commerce of the enemy; but the end of all insurance is to encourage commercial speculations by distributing the losses among a number of individuals. These objections to a policy effected during war are equally applicable to one effected before the war. It often happens that previous to the commencement of hostilities, the first act of the government is to seize the foreign vessels then in its own port. But if that property be insured here, the seizure will neither distress the foreigner, nor afford any security to our own government against the acts of foreigners in whose ports our ships may happen to be. It is true that the policy in question was lawful at the time when it was effected. But if it be illegal for an *Englishman* to insure against the hostile acts of the

1802.
FURTADO
v.
RODGERS.

British government, those acts are not to be considered as falling within the risks described in the policy. It is not to be intended that the Defendant contracted to do that which it was unlawful for him to do. Indeed admitting the contract to have been lawful at the time when it was made, and to have extended generally to all detentions of princes and people, the subsequent conduct of the *British* government dispenses with the performance of that part of it which relates to the hostile acts of that government. In *Brewster* v. *Kitchell*, 1 *Salk.* 198. it is said by *Holt* Ch. J. that "if a man covenant to do a thing which is lawful, and an act of parliament comes and hinders him from doing it, the covenant is repealed;" now it is as much competent to the King to declare war as it is to the parliament to make a statute; and if the commencement of war render it illegal to indemnify the foreigner against the hostile acts of the *British* government, that part of the contract is as much repealed as if an act of parliament had passed for that purpose. It is said that the enemy can receive no indemnity until the restoration of peace. Yet he may speculate during the war upon the certainty of receiving his indemnity at a future period: and though it is said that the King may sue for the debt, and thus destroy his expectation, it is much too improbable that such a prerogative would ever be resorted to, for the Court to found any argument upon it; and indeed the difficulty of enforcing that prerogative, from the defect of the necessary evidence (of which the greatest part would be in the enemy's possession) would render it almost wholly unavailing.

Cur. adv. vult.

The opinion of the Court was now delivered by

Lord ALVANLEY Ch. J. As it is of infinite importance to the parties that this case should be decided as speedily as possible, and as we entertain no doubts upon the subject, we think it right to deliver the judgment of the Court without any further delay: at the same time considering the magnitude of the question, we shall allow the parties to convert this case into a special verdict, in order that the opinion of the highest Court in this kingdom may be taken, if it should be thought necessary. There are two questions for our consideration; 1st, Whether it be lawful for a *British* subject to insure an enemy from the effect of capture made by his own government? 2dly, Whether, if that be illegal, the insurance in this case having been made previous to the commencement of hostilities

1802.

FURTADO v. RODGERS.

ties will make any difference? As to the 1st point, it has been understood for some years past to have been the opinion of all *Westminster-Hall*, and I believe of the nation at large, that such insurances are not strictly legal or capable of being enforced in a court of justice. The cases upon the subject are all brought into a small compass in the two valuable books of Mr. *Park* and my Brother *Marshall*. Mr. *Park* seems to consider the cases of *Brandon* v. *Nesbitt* and *Bristow* v. *Towers* as having decided the point (*a*); but after looking very accurately into all the cases, I am ready to admit that there is no direct determination. The above two cases proceeded on the short ground of alienage, which was sufficient to support the decision of the Court without entering into the other question; and I do not think the latter words of Lord *Kenyon* in *Brandon* v. *Nesbitt*, applied as they are to the case of *Ricord* v. *Bettingham*, support the inference which has been drawn by my Brother *Marshall* (*b*) in his book, *viz.* that his Lordship thought that a policy effected previous to the war might be sued upon in the event of peace, even though the loss sustained by the assured arose from *British* capture. It is well known that for a considerable time, not only some politicians entertained an opinion that insurances on enemy's property were beneficial, but that a great Judge went so far as to try causes in which this point directly appeared, and permitted foreigners in their own names, and for their own benefit, during the war, to recover on policies of insurance on foreign goods against *British* capture. The opinion of that learned Judge, as to the policy of such insurances, is well known, and it was supposed he would not have sanctioned them unless his opinion in point of law had been equally favourable. But we have now the best evidence (*c*) that his sentiments in that respect were different from what they were supposed to be. Though he did try causes upon such insurances, he always entertained doubts upon the law, and endeavoured to keep out of sight a question which might oblige him to decide against what he thought for the benefit of the country. This takes off materially from the effect of those cases which have been cited, to induce a supposition that the law of *England* had tolerated such insurances. How far it is consistent with good faith, after so long an acquiescence, to set up a defence which the foreigner may say he had no reason to expect, is a ques-

(*a*) See *Park's Insur.* p. 14. 240.

(*b*) See *Marshall on the Law of Insurance*, p. 37. 600.

(*c*) See what is said by *Buller* J. *ante*, vol. 1. p. 354.

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1802.
FURTADO v. RODGERS.

tion for the decision of Defendant and not that of the Court. We can only say, that although many persons have recovered in such actions, it is equally true that doubts have been entertained by many persons as to their right to recover, and that most of those who were informed upon the subject were firmly persuaded that the objection might have been made with success. This affords a sufficient vindication to the courts of this country in now deciding this point against a foreigner. In the year 1748 an act (*a*) passed prohibiting the insurance of *French* ships and goods during the war; this was at least a legislative declaration of the impolicy of such insurances at that time. From the expiration of that act to the passing of the 33 *Geo.* 3. *c.* 27. *f.* 4. no legislative interference upon the subject ever took place, and previous to the last mentioned act the policy in question was effected. By the terms of the policy the underwriters certainly undertake to indemnify the Plaintiff against all captures and detentions of princes, without any exception in respect of the acts of the government of their own nation. The question then is, Whether the law does not make that exception, and whether it be competent to an *English* underwriter to indemnify persons who may be engaged in war with his own sovereign against the consequences of that war? We are all of opinion that on the principles of the *English* law it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by act of parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by act of parliament, he is not bound by his contract. This was expressly laid down in *Brewster* v. *Kitchell*, 1 *Salk.* 198. And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract. With respect to the expediency of these insurances, it seems only necessary to cite a single line from *Bynkershoek* (*b*), and part of a passage in *Valin* (*c*). The former says, "*Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promovere,*" and the latter, speaking of the conduct of the *English* during the war of 1756, who permitted these insurances, says, "The consequence was, that one part of that nation restored to us by the effect of insu-

(*a*) 21 *Geo.* 2. *c.* 4.

(*b*) *Quæst. Juris Pub. lib.* 1. *c.* 21. *Marshall.* p. 31.

(*c*) P. 32. *Marshall.* p. 32.

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"rance, what the other took from us by the rights of war." Lord *Hardwicke* indeed, in *Henckle* v. The Royal Exchange Assurance Company, 1 *Vez.* 320. uses these words: "No determination has been that insurance on enemies' ships during the war is unlawful; it might be going too far to say all trading with enemies is unlawful, for that general doctrine would go a great way, even where only *English* goods are exported, and none of the enemies' imported, which may be very beneficial. I do not go on a foundation of that kind, and there have been several insurances of this sort during the war which a determination upon that point might hurt." This however is but a doubtful opinion as to the legality of such insurances, and not very favourable to them. In *Planche* v. *Fletcher* Lord *Mansfield* is certainly reported to have said, "it is indifferent whether the goods were *English* or *French*, the risk insured extends to all captures," which seems at first to go a great way towards giving effect to insurances against *British* capture. But we must suppose this to have been said because the Defendant did not press the objection; and if the party acquiesced, the expression gives no more weight to the case than belongs to any of the other cases which have been cited, such as *Bermon* v. *Woodbridge*, *Eden* v. *Parkinson*, and *Tyson* v. *Gurney*, in which the question was not raised at all. On the other hand the cases of *Brandon* v. *Nesbitt* and *Bristow* v. *Towers* certainly proceeded on the ground of alienage. There is no express declaration therefore of the court of King's Bench, either for or against the legality of such insurances, and the question comes now to be decided for the first time. We are all of opinion that to insure enemies' property was at common law illegal, for the reasons given by the two foreign jurists to whom I have referred. If this be so, a contract of this kind entered into previous to the commencement of hostilities must be equally unavailable in a court of law, since it is equally injurious to the interests of the country; for if such a contract could be supported, a foreigner might insure previous to the war against all the evils incident to war. But it is said that the action is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy however is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter. Since the case of *Bell* v. *Potts*, it has been universally understood that all commercial intercourse with the enemy is to be considered as ille-

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1802.

FURTADO v. RODGERS.

gal at common law (though previous to that case a very learned Judge (*a*) appears to have entertained doubts on that subject) and that consequently all insurances founded upon such intercourse are also illegal. Why are they illegal? Because they are in contravention of his Majesty's object in making war, which is by the capture of the enemies' property, and by the prohibition of any beneficial intercourse between them and his own subjects to cripple their commerce. The same reasoning which influenced the Court of King's Bench in their decision in *Bell* v. *Potts*, seems decisive in the present case. For it being determined that during war all commercial intercourse with the enemy is illegal at common law, it follows that whatever contract tends to protect the enemy's property from the calamities of war, though effected antecedent to the war, is nevertheless illegal. It has been supposed that the doctrine which has prevailed respecting ransom bills tends to favour these insurances; but no action was ever maintained upon a ransom bill in a court of common law until the case of *Ricord* v. *Bettenham* (*b*), and I have the authority of Sir *William Scott* for saying, that in the Admiralty Court the suit was always instituted by the hostage. The case of *Ricord* v. *Bettenham* however, certainly tended to shew that such an action might be maintained in the courts of common law at the suit of an alien enemy. In consequence of this a similar action was brought in *Cornu* v. *Blackburn* (*c*), and after argument the court of King's Bench held that it might be sustained. But in *Anthon* v. *Fisher* (*d*), the contrary was expressly determined upon a writ of error in the Exchequer Chamber. I forbear to enter into the argument suggested at the bar in favour of the Defendant, that the law will not enforce a contract founded on a transaction detrimental to the public policy of the state. The ground upon which we decide this case is, that when a *British* subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country; and that if he had expressly insured against *British* capture, such a contract would be abrogated by the law of *England*. With respect to the argument insisted upon by way of answer to the public inconvenience likely to arise from permitting such contracts to be enforced, *viz.* that all contracts made

(*a*) Mr. Justice *Buller* in *Bell* v. *Gilson*, *ante*, vol. 1. p. 345.

(*b*) 3 *Bur.* 1734. 1 *Bl.* 563.

(*c*) *Doug.* 641.

(*d*) *Doug.* 649, 650. *in notis.*

with

with an enemy enure to the benefit of the King during war, and that he may enforce payment of any debt due to an alien enemy from any of his fubjects, we think it is not entitled to much weight. Such a courfe of proceeding never has been adopted; nor is it very probable that it ever will be adopted, as well from the difficulties attending it, as the difinclination to put in force fuch a prerogative. The Plaintiff, I am forry to fay, is not entitled to a return of premium, becaufe the contract was legal at the time the rifk commenced, and was a good infurance againft all other loffes but that arifing from capture by the forces of *Great Britain*.

Judgment for the Defendant.

BARING and Others *v.* CLAGETT.

THIS was an action on a policy of infurance, dated the 18th of *June* 1796, on 25 hogfheads of fugar, valued at 40*l.* *per* hogfhead, on board the *Mount Vernon*, "at and from *Philadelphia* to *London*, with liberty to touch at one port in the channel," the premium was three guineas *per cent.* the fhip being ftated in the policy to be an "*American* fhip."

The caufe was tried before Lord *Alvanley* Ch. J. at the fittings after *Trinity* Term 1801, when the jury found a verdict for the Plaintiffs, damages 290*l.* 11*s.*, fubject to the opinion of the court upon a cafe ftating; that the *Mount Vernon* at the time the infurance was effected, when the fhip failed upon the voyage infured, and when fhe was afterwards captured, was the fole property of *William Mayne Duncanfon*; that the faid *William Mayne Duncanfon* was born a *Britifh* fubject, under the allegiance of the King of *Great Britain*, had refided in the United States of *America* fince the 22d of *Auguft* 1794, but at none of the above periods was naturalized, or by the laws of the *United States* entitled to be naturalized as an *American* citizen, but that he was entitled to be, and was in fact naturalized as fuch in *October* 1796; that the *Mount Vernon* had formerly been the property of *Thomas Murgatroyd*, an *American* citizen, and that

Policy of infurance on a fhip warranted *American*. To negative this warranty a fentence of condemnation of a *French* court at *St. Domingo* was given in evidence, which began thus: "Condemnation of the *Englifh* fhip *Mount Vernon*. Extract from the books of the office of the provifional tribunal refpecting prizes eftablifhed at *St. Domingo*. We *F. P.* Judge," &c. and after ftating that the circumftances of papers having been thrown overboard, the captain and fupercargo having abandoned the fhip, the captain being a *Portuguefe* without a certificate of his naturalization, and the *United States*, in their laft treaty with *England*, having fuffered to be added to the articles which had before been confidered as contraband of war, ftaves, &c. were fufficient motives to condemn the faid fhip, condemned the fame as property belonging to the captor. Held that this fentence was conclufive evidence that the fhip was not *American*.

Quære, Whether if a fhip be warranted *American*, the affured does thereby undertake that fhe fhall be owned and navigated according to all the regulations of the *American* navigation act?

1802.
BARING v. CLAGETT.

the following are copies of the ship's register and certificate of registry, in the form in which they existed when the ship sailed upon the voyage insured; [Here was introduced the original register of the *Mount Vernon*, in the name of *Thomas Murgatroyd* owner, and *John Cox* master, with a subsequent indorsement, stating *George G. Dominick* to have taken the oath required by law, and to be master in lieu of *John Cox*.] that the destination of the ship was *Cowes* and a market, and that the Plaintiffs were to direct to what market she should go; that the property insured was on board at the time of the capture hereinafter mentioned, and the assured were interested therein to the amount of the sum insured; that the ship sailed on the 2d *June* 1796; that together with the usual documents taken out by *American* vessels, she had on board the following passport; [Here was introduced the triplicate pass, the translation from the *French* of which, as far as it respects the argument of this case, was as follows; "To all who shall see these "presents. Be it known that leave and permission has been "granted to *George G. Dominick*, master or commander of the ship "*Mount Vernon*, of the town of *Philadelphia*, of the burthen of "424 $\frac{2}{9}\frac{7}{5}$ tons or thereabouts, being at present in the port of *Phila-"delphia* and bound for *Hamburgh* loaded with sundries *per* ma-"nifest," &c.] that two hours after the pilot had been discharged, and as soon as the ship had sailed out of the river *Delaware* she was boarded and taken possession of by the *Flying Fish*, an authorized cruiser of the Republic of *France*, and afterwards carried into the port of *St. John* in the *Spanish* island of *Porto Rico*; that whilst remaining there the ship and cargo were libelled by the captors in the provisional tribunal of prizes at *St. Domingo*, being a court of proper judicature established by the Republic of *France* for the determination of questions of prize; that in the above court a sentence was pronounced, the form of which is as follows: "Thirteenth *Fructidor* (the 30th of *August*, fourth year.) Condemnation of the *English* ship *Mount Vernon*. Extract from the books of the office of the provisional tribunal respecting prizes, established in *St Domingo*. We *Francis Pons*, Judge of the provisional tribunal respecting prize established in *St. Domingo*, having looked over our sentence of the seventh *Thermidor* last, where all the papers exhibited by citizen *Nadal*, captain of the privateer *Flier*, against the ship *Mount Vernon*, are duly noticed, through which we had submitted the decision of this prize to the civil commission of *Guarico*, which

1802. BARING v. CLAGETT.

applies again to our tribunal for pronouncing ſentence on this ſubject; having noticed alſo inſtructions which were officially given us by the citizen agent of the *French* Republic in this city, iſſued by the civil commiſſion aforeſaid, in whoſe archives they have been duly recorded, from which it appears firſt, that the papers having been thrown into the ſea by the captain in ſight of the privateer which captured him, ſecondly, that the captain and ſupercargo having precipitately abandoned their ſhip, in ſpite of the good treatment received by them from the *French* captain, and the hints he gave them about remaining there in order to plead their own cauſe, and thereby avoid her confiſcation, thirdly, the behaviour of the captured crew, fourthly, the captain being a *Portugueze* without a certificate of his naturalization, fifthly, that the *United States*, in the laſt treaty which they concluded with *England*, having ſuffered to be added to the articles which have been looked upon till at preſent as contraband of war, ſtaves, tackles, ſailcloth, iron hoops, and finally all which can be made uſe of for veſſels, are ſufficient motives to condemn ſaid ſhip; after a ſerious examination we have judged and do judge that the ſhip *Mount Vernon*, captain *George Dominico*, *Portugueze*, with her cargo, has been duly and juſtly captured by the *French* privateer commanded by citizen *Nadal*, to whom we adjudge her as property belonging to him, and of which he may diſpoſe under the clauſes and conditions made with his officers and crew, he being accountable for the duties of invalids and the coſts of the tribunal, which he ſhall pay to the bearer of our notary's order. *Santo Domingo*, *Fructidor* thirteenth (*Auguſt* thirtieth). Fourth year of the *French* Republic, one and indiviſible. Signed in the Regiſter, *Pons* Judge, and *Deſpujeaux* Notary Public.

(Signed) PONS Judge.
Deſpujeaux Notary.

That under this ſentence of condemnation the *Mount Vernon* and her cargo were delivered up to the captors by the *Spaniſh* governor of *Porto Rico* (*a*).

The

(*a*) At this part of the caſe were introduced ſeveral articles of the treaty between *France* and *America*, dated 6th *February* 1773, and alſo ſeveral paſſages from the *American* laws. Such as are material to the argument, are either ſtated at length or abridged.

Art. 12. of the treaty requires the ſhips of either party to exhibit, not only their paſſports, but certificates ſhewing that their cargo is not contraband.

Art. 25. "To the end that all manner of diſſenſions and quarrels may be avoided and prevented on one ſide and the other, it is

1802.
BARING v. CLAGETT

The question for the opinion of the Court was, Whether the Plaintiffs were entitled to recover?

Bayley

is agreed that in case either of the parties hereto shall be engaged in war, the ships and vessels belonging to the subjects or people of the other ally must be furnished with sea-letters or passports, expressing the name, property, and bulk of the ship, as also the name and place of habitation of the master or commander of the said ship, that it may appear thereby that the ship really and truly belongs to the subjects of one of the parties, which passports shall be made out and granted according to the form annexed to this treaty, they shall likewise be recalled every year, that is, if the ship happens to return home in the space of a year. It is likewise agreed, that such ships being loaden, are to be provided not only with passports as above mentioned, but also with certificates containing the several particulars of the cargo, the place whence the ship sailed, and whither she is bound, that so it may be known whether any forbidden or contraband goods be on board the same, which certificate shall be made out by the officers of the place whence the ship set sail, in the accustomed form; and if any one shall think fit or adviseable to express in the said certificates the person to whom the goods on board belong he may freely do so."

Art. 27. regulates the mode of treatment to be observed towards the ships of the "subjects, people, or inhabitants," of either party when met with by ships of war or privateers, *viz.* that on production of their passports they shall be at liberty to pursue their voyage.

By the *American* navigation act the following provisions are made: "That ships or vessels which shall have been registered by virtue of the act intituled, "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," and those which after the last day of *March* next shall be registered pursuant to this act and no other (except such as shall be duly qualified according to law for carrying on the coasting trade and fisheries, or one of them) shall be *denominated and deemed ships or vessels of the* United States; *entitled to the benefits and privileges appertaining to such ships or vessels.* Provided that they shall not continue to enjoy the same longer than they shall continue to be wholly owned, and to be commanded by a citizen or citizens of the said *United States*; that ships built within the *United States*, either before or after the 4th *July* 1776, and belonging to a citizen of the *States*, and ships not built within the *States*, but on the 16th *May* 1789, and from thenceforth belonging to a citizen, and ships captured and condemned as prize, or for a breach of any *American* law, may, if owned by a citizen, be registered, but that no other ships may be registered; that in order to entitle any ship to a registry, an oath must be made before the proper officer, stating the name and burthen of the ship, the place where and the time when she was built, and in short making it appear that according to the provisions of the navigation act she is entitled to be registered, and that if any of the facts stated in such affidavit are within the knowledge of the party making the affidavit false, the ship shall be forfeited; that every change in the commander of the ship shall be reported to the collector of the district where the same happens, or where the ship first arrives after such change, on pain of forfeiture of the registry, and the collector shall indorse on the certificate of registry the name of the new commander; that if a ship be registered, and afterwards transferred by way of trust to a subject of any foreign prince or state, and such transfer shall not be notified, such ship shall be forfeited; that on the return of any registered ship to the port where her owner, or any part owner resides, such owner or part owner shall make oath that the register still contains the names of all the persons who are owners, specifying any transfer that has been made since the register was granted, and that no foreign subject has any share; if the ship returns to a port where no owner or part owner resides, then the commander shall make the like oath; if neither will make the affidavit, then the ship "shall not be entitled to the privileges of a ship or vessel of the *United States*."

By the *American* naturalization act passed and approved 26th *March* 1790 it is provided

1802.

BARING v. CLAGETT.

Bayley Serjt. for the Plaintiffs. Three points I underſtand are to be inſiſted on for the Defendant: 1ſt, That the warranty contained in the policy that the *Mount Vernon* was an *American* ſhip, has not been complied with, becauſe the owner of the *Mount Vernon* was not a naturalized *American* ſubject; 2dly, That the *Mount Vernon* was not navigated as an *American* ſhip ought to be, the *American* navigation act requiring the captain to be a citizen of the *United States*, whereas *G. G. Dominick* was a *Portugueze*; and 3dly, That the treaty between *America* and *France* has been infringed by the *Mount Vernon*, her paſſport not having truly deſcribed her intended voyage. Moſt clearly the *Mount Vernon* was not entitled to the peculiar municipal privileges conferred on ſhips belonging to naturalized ſubjects of the *United States*, her owner not being a naturalized ſubject. But the meaning of the warranty is not that ſhe was to be entitled to thoſe privileges, but that according to the law of nations and the treaties exiſting between *America* and other countries ſhe ſhould be an *American* ſhip; the riſk of the underwriters not being varied by the privileges to which ſhe is entitled in the ports of *America*, but by the treatment to which ſhe is entitled from the belligerent powers upon the high ſeas. The diſtinction between *Britiſh* built and *Britiſh* owned ſhips, between ſuch as acquire certain privileges in conſequence of their regiſtry, and ſuch as are merely owned by ſubjects of this country, is obvious. Could it however be contended for an inſtant, that a ſhip *Britiſh* owned, though not *Britiſh* built, would not fall within the meaning of a warranty that ſhe was *Britiſh*? Would not ſuch a ſhip ſail under the protection of the

vided, that any alien being a free white perſon, after two years' reſidence within the *United States*, may be admitted a citizen by any of the common law courts, on his ſatiſfying ſuch court that he is a perſon of good character, and taking the neceſſary oaths.

By a ſubſequent act of naturalization, paſſed and approved the 29th of *January* 1795, the privilege of being naturalized is reſtricted to thoſe who declare upon oath before ſome of the courts there enumerated, their intention of applying to be naturalized at leaſt three years before the time of their admiſſion, and at the time of their application to be admitted to be naturalized declare upon oath before ſome one of the ſame courts, that they have reſided within the *United States* at leaſt three years, and within the ſtate or territory where the court is held to which they apply, one year at leaſt. But it is provided that perſons reſident in *America* at the time the above act was paſſed, may be naturalized if they declare upon oath that they have reſided two years within the *United States*, and one year within the ſtate or territory where the court to which they apply is ſitting.

The caſe alſo ſtated that either party ſhould be at liberty to refer to any part of the *American* laws, or the treaty of the 6th *February* 1778, between *France* and *America*, as if they had been fully ſtated.

Britiſh

1802.

BARING v. CLAGETT.

British flag and be entitled to the interference of the *British* government if improperly molested by any belligerent power? The same observation applies to the warranty of an *American* ship, and though the *Mount Vernon* would, as belonging to a person not naturalized in *America*, be obliged to pay higher duties in the ports of *America* than if she had belonged to a naturalized subject of the *United States*, she must nevertheless be deemed an *American* ship, and as such be entitled to the same treatment from belligerent powers, and the same protection from the *American* government as any other ship belonging to a naturalized subject of the *United States*. The *American* register act is founded on the same principle as the *British* register act, and with a view to municipal regulations merely. The terms of the *American* navigation act are, that ships not registered shall not "be denominated and deemed ships or "vessels of the *United States*, entitled to the benefits and privileges "appertaining to such ships or vessels." The latter part of the sentence sufficiently explains the former, *viz.* that they shall not be deemed ships of the *United States*, with a view to particular privileges in the *United States*, though with a view to national privileges as against the rest of the world they remain as before that act. This is further explained by the fact that ships of the *United States* pay a duty inwards of only six cents *per* ton, while ships not of the *United States* pay in some cases ten, in some thirty cents *per* ton. In addition to which it may be observed, that by the *American* navigation act, if the property of a ship be altered she must be registered anew, otherwise the ship shall cease to be deemed a vessel of the *United States*, and also that if the change of the master be not reported the register is void. Now suppose such a ship built within the *United States*, and owned by a naturalized subject of the *United States*; would she from the moment she incurred the forfeiture of her registry cease to be an *American* ship, and entitled to the protection of the *American* government? Though she ceases to be an *American* ship for certain purposes, it is most clear she does not become a ship of any other nation. An *American* subject is only thus far distinguishable from an *American* citizen, that the latter is entitled to privileges which the former is not; but both are equally entitled to the protection of the *American* government. Had *America* been at war with *France*, and *Great Britain* at peace with her, the *Mount Vernon* would have been a subject of prize to

the cruisers of *France*, notwithstanding her owner was not a naturalized subject of the *United States*, and the *British* government could not have interfered in his favour, nor could she have been warranted *British*, for the domicile of her owner would have falsified such a warranty. The converse of the present case was decided by Lord *Kenyon* in the case of *Tabbs* v. *Bendelack* (*a*). Though part of the treaty between *America* and *France*, requires that a ship, in order to be deemed an *American* ship as between the two powers, shall be

(*a*) *Tabbs* v. *Bendelack*. Sittings after *Trinity* Term 1801. *coram* Lord *Kenyon* at *Guildhall*.

This was an action on a policy of insurance on the freight of the ship *Franklin*, warranted *American*, at and from *Liverpool* to *Naples* or *Sicily*, with leave to discharge at *Leghorn*. The policy was dated the 29th of *December* 1800. It appeared that the Plaintiff was an *American* born, had resided in *America*, and had been employed in navigating vessels between this country and *America*; that having married in *Liverpool*, he had, from the year 1797, occupied a house there, in which his wife and children resided; that since that time he had once or twice navigated a ship from *Liverpool* to *America*, and back again, but that during the last year he had never been out of *England*, but had employed others to navigate his vessels to *America* and elsewhere, his family constantly residing at *Liverpool*; that in *October* 1800, he had purchased the *Franklin*, which was an *American* ship, and regularly documented as such from her owner, who was an *American*, and had brought her over from *America*; and that when the voyage to which the policy related should be completed, the Plaintiff intended to return in her with his family to *America*. The action was brought in consequence of a loss by capture.

For the Defendant it was objected that the warranty had not been complied with, inasmuch as the Plaintiff was residing under and entitled to the protection of *Great Britain*, and had no right to set up his privileges as a citizen of *America* against the belligerent powers.

For the Plaintiff it was insisted that his residence here was merely temporary, that he had the *animus revertendi*, and was therefore entitled to warrant his ship *American*.

Lord *Kenyon* Ch. J. Whether the Plaintiff has the intention of returning to *America* or not at a future period cannot affect the present question. In the policy he has warranted the ship *Franklin* to be *American*; from which warranty, the underwriters collected that she was entitled to the privileges of an *American* ship. But whether the ship be entitled to those privileges or not does not depend merely upon her owner being an *American* born. Persons residing in this country, reaping the advantages of the trade of this country, and contributing to the well-being of this country, must for the purposes of trade be considered as belonging to this country. By the law of nations, therefore, the property of such a person is liable to capture by belligerents, on the ground of such property belonging to a subject of this country. That rule of law was acted upon in the *Saint Eustatia* cases at the Cockpit, when Lord *Camden*, and some of the greatest persons that ever adorned the law of this country presided there. In the case of the *Argonaut**, though we were of opinion that *Collett* being a native of this country, could not put off his allegiance to it, but might be guilty of high treason against the state, yet we thought that being domiciled in *America* he was entitled to the privileges of an *American*.—The Plaintiff was nonsuited.

The Attorney General (*Law*), *Erskine*, *Park*, and *Gaselee*, for the Plaintiff.

Garrow and *Gibbs* for the Defendant.

* *Wilson* v. *Marryatt*, 8 *T. R.* 31. also *ante*, vol. 1. p. 430.

1802.
BARING v. CLAGETT.

registered according to the provisions of the *American* navigation act, yet the question between the parties to this action must be decided by reference to the general law of nations, according to which the warranty that the *Mount Vernon* was *American*, has been complied with. As to the 2d objection, that the *Mount Vernon* was not navigated according to the laws of *America*, the captain being a *Portugueze*, whereas he ought to have been a citizen of the *United States*, both the fact and the conclusion drawn from that fact may be denied. The fact is collected from the sentence of condemnation; whereas that sentence only says that the captain was a *Portugueze* without a certificate of his naturalization. By the laws of the *United States*, previous to the act passed in 1795, any person who had resided in *America* for two years was entitled to be naturalized. Now the sentence does not allege that he was not a citizen of *America*, but merely that he had not about him at the time of the capture the evidence of his being a citizen. But the treaty between *America* and *France* does not require that a foreigner who has acquired citizenship in *America*, should carry about him the certificate of his naturalization; nor indeed, as between the two powers, is it necessary that the captain should be an *American* citizen, though in consequence of his not being so the ship is not entitled to the municipal privileges of a ship of the *United States*. [*Heath* J. By the 25th article of the treaty, the passport is to express the name and place of habitation of the master and commander of the ship. Now in the passport stated in the case, though the name of the master and commander is mentioned, his place of habitation does not seem to be stated; for the words, "of the town of *Philadelphia*," immediately follow the name of the ship, and seem descriptive of the port to which she belongs.] Both the terms and the spirit of the treaty are satisfied if any part of the passport express the place of habitation of the commander. Indeed the words "of the town of *Philadelphia*," clearly refer to the captain and not to the ship, for in the printed copy of the passport, the blank left for the name of the captain is not sufficiently large to introduce his place of habitation also, and then after the description of him as "master or commander," is left another blank, large enough for the introduction of the name of the ship and the place of the master's habitation. Nor does the treaty require that the particular port to which the ship belongs should be expressed. The Court therefore will rather apply the description to the master, such de-

scription of him being necessary to be inserted, than to the ship which need not be so described. Probably every passport which has been filled up since the treaty between *America* and *France* has been filled up in the same way as this, and therefore it should rather be construed by usage than the nicety of a strict grammarian. The 3d objection taken is, that the passport has not truly described the destination of the ship. It is necessary to observe, that by the treaty it is not required that the passport should express the place of destination, but that the certificate of clearance should express it. Now it is stated in the case that the *Mount Vernon* had "the usual documents taken out by *American* ships;" it must be presumed therefore that her certificate of clearance was regular. It is only incumbent on me to contend that the destination of the ship stated in the passport was introduced *bonâ fide*, and not with a view to mislead the cruisers of the belligerent powers. It happened that when the ship sailed, part of her cargo was not admissible into the ports of *Great Britain*, and if that inadmissibility had continued to the time of her arrival at *Cowes*, *Hamburgh* would have been the market to which she would have gone. At the time of her sailing therefore her port of discharge was not decided upon, but was left to the discretion of the house of *Baring* and Co. Previous to her arrival at *Cowes*, an act of parliament had passed allowing the importation of the commodity before prohibited, provided an order of council could be obtained for that purpose; whereupon the house of *Baring* and Co. decided that *London* should be her port of discharge. *Hamburgh* therefore being the most probable place of destination at the time she sailed on her voyage, that place was mentioned in the passport as her place of destination. The spirit of the treaty must be held only to require an *American* to state the place of destination of the ship to the best of his knowledge and belief, or he would be excluded from sailing upon any voyage with a cargo, the destination of which was not unalterably fixed. [Here he was proceeding to observe, that in the *French* copy of the treaty between *America* and *France*, in which language it was originally drawn, and which in case of dispute was to bind, no mention was made of the passport or certificate, or any of the papers specifying the place to which the ship was destined, but only the place from whence she sailed; but the Court held him precluded from referring to the *French* copy in contradiction to that translation which had by agreement been introduced upon the case.]

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1802.

BARING v. CLAGETT.

Best Serjt. *contrà*. The *Mount Vernon* being warranted to be an *American* ship, must in every sense of that description be completely *American*, and be furnished with all the documents of an *American* ship, or the warranty is not fulfilled. It is not necessary to deny as a general proposition, that for the purposes of trade a man must be considered to be of that country where he happens to be domiciled. But to that general proposition must be added this qualification, that the universal practice of nations on this point may be varied by the particular regulations of any individual state, as far as respects that state, and the subjects of that state. Every nation has a right to say upon what terms foreigners shall be allowed to be naturalized among them, or otherwise become entitled to the protection of the state; and they have a right also to direct that the property as well as the persons of foreigners coming to reside amongst them, shall have complied with certain stipulated forms before it shall be deemed to be the property of a member of such a state. Upon this principle *America* has acted; she found that her population was rapidly increasing by the influx of foreigners, and that numbers were aiming at a participation of that commerce which she by her neutrality had protected during the war. This gave rise to the naturalization act, and till a foreigner has complied with the requisites of that act he cannot claim any of the privileges of a citizen of the *United States*. On the same principle also proceeds the *American* navigation act, declaring that no ship shall be denominated and deemed a ship of the *United States*, and entitled to the benefits and privileges appertaining to such ships unless registered, and that she shall not enjoy the same longer than she shall continue to be wholly owned and commanded by a citizen of the *United States*. The legislature of *America* therefore has decided what ship answers the description of the warranty contained in this policy, and it is perfectly clear that the *Mount Vernon* was not that kind of ship to which alone the *American* government has extended the privileges of *American* protection. Had the legislature of *America* meant to confer upon the ships belonging to the citizens of that country nothing more than certain advantages in the payment of duties, that meaning would have been particularly expressed. The terms of the act exclude ships not complying with the provisions of the act from all privileges, and certainly not the least valuable privilege conferred by a neutral state is that of being exempted from the calamities of war. It appears indeed that the *Mount Vernon* had no sooner cleared the *De-*

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laware than she was captured by the *French* privateer, who, aware that she was not *American* property, watched her departure. Nor is there any weight in the argument that if this ship could not be warranted *American*, she could not be warranted of any other nation; for it does not follow that because a man by his conduct forfeits his rights as a subject of one country, he therefore necessarily and *eo instanti* acquires rights as a subject of some other country. The sentence of condemnation completely supports the second objection, *viz.* that the captain was not a citizen of the *United States*; for, after alleging among the reasons of condemnation, "the captain being a *Portugueze* without a certificate of his naturalization," it proceeds in the adjudicating part to condemn after "a serious examination," (that is, of all the facts previously alleged) "the ship *Mount Vernon*, captain *George Dominico*, *Portugueze*." Consistently therefore with all the decisions upon the effect of foreign sentences, and particularly with the doctrine lately laid down at the *Cockpit* in the case of *Kindersley* v. *Chase*, *Park*, 363. (*o*) ed. 5. it is not competent to the Plaintiffs to dispute the fact of the captain being a *Portugueze*. For if a sentence state several facts sufficient to legalize condemnation, and then proceed to condemn generally, the facts stated in the sentence are conclusive and cannot be controverted. But in this case the court have alleged in the adjudicating part of the sentence that the captain was a *Portugueze*, which precludes any argument upon the point. It is observable also, that the title of the sentence of condemnation is not of an *American* ship, but "of the *English* ship *Mount Vernon*." But thirdly, the ship's papers are not such as the treaty between *America* and *France* requires; consequently in that respect the warranty is not fulfilled. The observation made by Mr. Justice *Heath* on the defect of the passport in not stating the place of habitation of the master, is of itself a sufficient bar to the Plaintiffs' recovery; for it is impossible to apply to him the words "of the town of *Philadelphia*," without applying also to him the words "424 tons burthen," which immediately follow. This omission possibly weighed much with the *French* court in coming to the conclusion that he was not an *American*. But independent of this objection, it appears that the destination of the ship is not truly described in the passport. The destination stated in the passport is "*Hamburgh*;" the destination found upon the case is "*Cowes* and a market," subject to the direction of the Plaintiffs. The variance between the two descriptions is most evident, and with a view to a compliance

1802. BARING v. CLAGETT.

with the treaty most important; the ship having been represented as proceeding to a neutral port, when in fact she was proceeding to the port of a belligerent. It is not necessary to insist that this would have been good ground of condemnation, for if it would have justified detention only, the underwriter is discharged. *Rich* v. *Parker*, 7 *T. R.* 705. If it be argued that the passport need not have noticed her destination, and that possibly her certificate of clearance is correct in the statement of the destination, still there must in that case be a discordancy among the ship's papers, which of itself would induce the cruisers of *France* to detain her for examination. Indeed if such be the case, that *bona fides* which has been urged as a justification of the description must be abandoned; for if her certificate states her real voyage, and her passport some other voyage, it is clear that the latter description was not introduced because her destination was not decided upon at the time of her sailing, but with a view to deceive the belligerent powers.

Bayley in reply observed, that whatever the title of the sentence might be, the sentence itself did not profess to condemn on the ground of the *Mount Vernon* being an *English* ship, and therefore the title could have no effect whatever. He added, that the fifth reason stated in the sentence nearly amounted to a declaration of war with *America*, and evidenced most strongly that she was condemned for being an *American*; the *United States* having at that time displeased *France* by their treaty with *Great Britain*.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. who after stating the case proceeded thus: The first class of objections to the Plaintiff's recovery in this case which I shall consider, arises from the supposed non-compliance with the treaty between *America* and *France*. That treaty requires that in case either of the parties to the treaty shall be engaged in war, the ships and vessels belonging to the subjects or people of the other must be furnished with a sea-letter or passport expressing the name, property, and bulk of the ship, and also the name and place of habitation of the master or commander of the ship. Now in the passport stated in this case, the name of the master is undoubtedly set forth; but I think it would be a strange perversion of the construction of language to hold that the words "of the town of *Philadelphia*," which immediately follow the name of the ship, are applicable to the master, and descriptive of his habitation, and not of the port to which the ship belonged. If

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therefore there was not a general admission that the ship, "together with the usual documents taken out by *American* vessels," had the passport stated, I should have been of opinion that the treaty had not in this respect been sufficiently complied with, but I think from that general admission we are at liberty to presume that she had on board a sea-letter, expressing the name and place of abode of the master, and consequently that in this respect she did not violate the treaty between *America* and *France*. The same presumption may also be made in favour of the Plaintiffs, with respect to the objection taken, that the passport did not truly describe the destination of the ship: for though in the passport it is alleged that she was bound for *Hamburgh*, whereas her instructions were to go to *Cowes*, and a market, yet the latter destination may possibly have appeared upon the certificate of clearance, which we must suppose her to have had among the other documents usually taken out by *American* vessels. The next consideration is, Whether this ship was so owned and commanded as to have entitled herself to the privileges of an *American* ship, and thereby have complied with the warranty? It is insisted on the part of the Plaintiffs, that the non-compliance with the regulations of the *American* navigation act, although it may deprive the owners of the ship of certain municipal benefits, cannot affect the warranty: for that if the owner be really and *bonâ fide* a domiciled inhabitant of *America*, his ship thereby becomes an *American* ship within the meaning of the treaty between *France* and *America*. I am very far from thinking that such is the true construction of that treaty. The words of the navigation act are, that "no ships or vessels shall be denominated and deemed ships or vessels of the *United States*, and entitled to the benefits and privileges appertaining to such ships or vessels, unless they comply with the regulations of the navigation act." It has been argued that the *Americans* possibly may have the same sort of distinction with respect to ships registered and not registered as we have, and although the latter may not be entitled to some particular municipal privileges, yet that they are entitled to the protection of the *American* government. It does appear to me however, that the privilege of carrying the *American* flag as a safe conduct among belligerent powers, is one of those privileges intended to be denied to all ships but those which have complied with the regulations of the *American* navigation act. It is admitted that the owner of the *Mount Vernon* not having been na-

1802.
BAKING
v.
CLAGETT.

turalized in *America*, his ſhip had not acquired the privileges conferred upon ſhips by the navigation act: and I do not perceive enough ſtated upon the caſe to ſatiſfy me that the *French* had not a right to ſay that they were only obliged to reſpect as veſſels of the *United States* thoſe veſſels which the legiſlature of *America* had reſolved ſhould excluſively be deemed and denominated veſſels of the *United States*. The next ſubject of conſideration in this caſe is the ſentence of condemnation. Like other *French* ſentences it ſtates many reaſons, but draws no conſequences from thoſe reaſons: and though ſeveral facts are ſtated, as if leading either to the concluſion that the *Mount Vernon* was enemies' property, or that ſhe had not complied with ſome conditions requiſite to eſtabliſh her claim to the privileges of neutrality, yet the only concluſion at laſt drawn from theſe premiſes is, that the ſhip belongs to the captors as prize. If the words prefixed to this ſentence, *viz.* "Condemnation of the *Engliſh* ſhip *Mount Vernon*," are to be deemed part of the ſentence, they are of themſelves imperative upon us to hold that the warranty has not been complied with. Theſe words however are followed by this expreſſion, "Extract from the books of the office of the proviſional tribunal reſpecting prizes eſtabliſhed in *Saint Domingo*," and then the ſentence is ſtated at length. It has been argued that the fourth reaſon ſtated in the ſentence is not a direct allegation that the captain was a *Portugueze*, but only that he had not about him at the time of the capture the evidence of his having been naturalized. I think, however, the allegation as it now ſtands, coupled with what is ſtated in the adjudicating part of the ſentence, *viz.* that "the ſaid ſhip *Mount Vernon*, captain *George Dominico*, *Portugueze*, has been duly and juſtly captured," ſufficiently eſtabliſh that he was a *Portugueze*, and not a citizen of the *United States*. Now I think it was eſſential to the character of an *American* ſhip, that the captain ſhould, according to the regulations of the *American* navigation act, have been a citizen of the *United States*. It is unneceſſary for us at this time of day to deliver any opinion reſpecting the admiſſibility of ſentences of condemnation, as operating againſt the rights of third perſons, ſtrangers to the ſuit. On that point doubts have been entertained by very great authorities: but conſiſtently with the caſe of *Hughes* v. *Cornelius* (*a*), and a long ſeries of determinations in *Weſtminſter-Hall*, we muſt hold them to be admiſſible and concluſive between

(*a*) 2 *Show.* 232.

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the assured and the underwriter, with respect to every fact which they profess to decide (*a*). If indeed it had appeared that the sentence proceeded, not upon a falsification of the warranty contained in the policy, but upon some positive regulations of *France*, adopted without the assent of other nations, and contrary to the law of nations, the assured would still have been at liberty to prove his neutrality. No question can now arise as to the effect of such a warranty as the present: for I take it to be completely established by the cases of *Barzillay* v. *Lewis* (*b*), *Geyer* v. *Aguilar* (*c*), and *Rich* v. *Parker* (*d*), that if a ship be warranted *American*, she must not only belong to an *American*, but must in every respect be so documented as to entitle herself during the whole of her voyage to the privileges of the *American* flag. It was once doubted indeed by Lord *Kenyon* in the case of *De Souza* v. *Ewer* (*e*), whether the mere fact of condemnation as prize was not of itself conclusive against the warranty of neutrality, though special grounds of condemnation appeared upon the sentence not warranted by the law of nations: for it was considered that a contrary doctrine would impute bad faith to the tribunal by which the condemnation was pronounced; and unless such special grounds appear the sentence is undoubtedly conclusive. Accordingly in *Salucci* v. *Woodmass* (*f*) where a ship warranted neutral was condemned as good and lawful prize, that single allegation in the sentence was deemed sufficient to negative the neutrality of the ship, because, as no special ground of condemnation appeared, the court held themselves bound to suppose that it proceeded upon the just and lawful ground of the ship being enemies' property. But in *Bernardi* v. *Motteux* (*g*) the Court considered the sentence conclusive as to every thing which it professed to decide, yet held themselves at liberty to examine whether the ground on which the sentence proceeded actually falsified the warranty contained in the policy. Then follows a series of authorities in which the courts have determined that if the condemnation does not plainly proceed upon the ground of enemies' property, or that of the ship not having complied with subsisting treaties between her own country and that of the capturing power, but on the ground of regulations arbitrarily imposed by the latter, to which neither the government of the captured ship, nor the

(*a*) *Dict. per Le Blanc* J. 8 *T. R.* 444. *n.*
(*b*) *Park. Insur.* 359.
(*c*) 7 *T. R.* 681.
(*d*) 7 *T. R.* 705.
(*e*) *Park. Insur.* 361.
(*f*) *Park. Insur.* 362.
(*g*) *Doug.* 574.

1802.

Baring v. Clagett.

other powers of *Europe* have been made parties, such a condemnation shall not be admitted as conclusive against the warranty of neutrality. Such was the doctrine laid down in *Mayne* v. *Walter* (*a*), and confirmed in the subsequent cases of *Pollard* v. *Bell* (*b*), and *Bird* v. *Appleton* (*c*). The late case of *Price* v. *Bell* (*d*), is extremely like the present, and indeed if it were not for the words prefixed to the sentence in this case, there would be as much analogy as possible between the two cases. The sentence there proceeded upon much the same ground as the present sentence: and the Court of King's Bench was of opinion that there was nothing sufficiently conclusive upon the face of the sentence to negative the neutrality, the condemnation apparently proceeding upon reasons which were not justifiable. The last case to which I shall advert is that of *Kindersley* v. *Chase*, decided at the Cockpit, *July* 21. 1801, on appeal from the Mayor's Court at *Madras*, and reported in *Park's Insur.* p. 363. *o.* ed. 5. The judgment of the Court was there pronounced by the present Master of the Rolls, in a very able manner, who, after considering the conclusiveness of foreign sentences upon warranties of neutrality, and acquiescing in most of the principles laid down in our Courts, proceeded to discuss the particular sentence upon which that case came before the Council. He there adopted a principle most essential to be attended to in the construction of foreign sentences, namely, that the reasons stated in those sentences are not always to be considered as of themselves the grounds upon which the condemnation proceeds, but as the *media* of proof from whence a presumption may be drawn that the ship is or is not lawful prize. We are called upon therefore to consider what construction we ought to put upon the sentence of condemnation stated in this case. The question will be, Whether on the face of that sentence sufficient appears to shew that the *Mount Vernon* was condemned by the *French* court, not on the ground of her being enemies' property, but beause she had contravened some arbitrary edict of *France*, or not conformed to some regulation to which she was not bound to conform; or whether, on the other hand, taking the whole of the sentence together, we are not under the necessity of holding, as was holden in the case of *Kindersley* v. *Chase*, that it must be construed liberally in favour of the underwriters, and we must conclude that it proceeded on the ground of the ship being enemies' property, unless the contrary distinctly appear? In the body of the

(*a*) Park Insur. 363.
(*b*) 8 T. R. 434.
(*c*) 8 T. R. 562.
(*d*) 1 East, 663.

the ſentence there is nothing to ſhew that it proceeded on the want of any particular document, or non-compliance with any particular edict. In every country but our own, throwing papers overboard has, I believe, been holden to be ſufficient cauſe of condemnation; though I am not ſure whether in *France* that rule has been ſo laid down by way of poſitive inſtitution, or only as a mode of evidence from which the concluſion is to be drawn that the ſhip is enemies' property. Indeed in *England* that circumſtance alone has often been deemed ſufficient to warrant the ſame concluſion. Another reaſon ſtated in the ſentence is, that the crew ran away and refuſed to be examined. Now we all know that by the law of *England*, and I believe by the law of nations, it is incumbent upon the crew of a captured ſhip to ſubmit to examination: and if they do not, every thing hoſtile may be preſumed againſt them. Nobody therefore can ſay that this was not one of the grounds from which the *French* court drew the concluſion that the ſhip was enemies' property. Then comes the laſt reaſon ſtated in the ſentence, which I confeſs has raiſed conſiderable doubts in my mind as to the propriety of the ſentence. I did think that notwithſtanding all the reaſons previouſly ſtated, it might be fairly argued that the ſentence proceeded upon the laſt reaſon only, and was a declaration of war againſt *America*, conſidering *America* as having granted to *England* improper privileges. If this be ſo, the aſſured have a right to ſay that the *Mount Vernon* was condemned, not becauſe ſhe was not an *American*, but becauſe ſhe was an *American*. If therefore the title prefixed to this ſentence, was not to be conſidered as part of the ſentence, I ſhould very much doubt whether there were ſufficient on the face of the ſentence to warrant the concluſion that the ſhip was condemned on the ground of her being *Engliſh*: but if it be part of the ſentence, then the laſt reaſon ſtated is very material with reſpect to the conſideration whether the ſhip were *Engliſh* or not; for it was not unnatural for the *French* court to couple with the other circumſtances ſtated in the ſentence, the favourable diſpoſition of *America* towards *England*, and the readineſs to furniſh the *Engliſh* with ſuch documents as would entitle them to the privileges of the *American* flag. If therefore the laſt reaſon be not conſidered with reference to the title, that reaſon of itſelf, unconnected with the conſideration whether the ſhip was *Engliſh* or not, might be deemed the real ground of the condemnation, and then the underwriters would unqueſtionably be liable.

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1802.
BARING
v.
CLAGETT.

But coupling this title with the objections taken to the ship's papers, and the regulations by treaty between *America* and *France*, and considering that it makes no difference whether the ground on which the ship was condemned appear at the beginning or the conclusion of the sentence, I am of opinion, and my Brothers concur with me for all or some of these reasons, that the *Mount Vernon* was condemned either as not being an *American*, or for not having those documents which entitled her to the privileges of the *American* flag in the court of a belligerent power. The postea therefore must be delivered to the Defendant.

Per Curiam, Postea to the Defendant.

END OF TRINITY TERM.

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the Forty-third Year of the Reign of GEORGE III.

1802.

SMITH and Another, Affignees of J. S. a Bankrupt, *v.* BARCLAY.

Nov. 11th.

In an action by the affignees of a bankrupt, it is not fufficient for the bankrupt to negative a tender in Bank notes.

THIS was an application to the Court to difcharge the Defendant out of cuftody on his entering a common appearance, the affidavit to hold to bail being made by the bankrupt, and ftating a commiffion to have iffued againft himfelf, under which the Plaintiffs were appointed affignees, and that the Defendant was juftly and truly indebted to them, "and that no tender or offer had been made to pay the faid debt, or any part thereof, in or by any notes of the Governor and Company of the Bank of *England*, expreffed to be payable on demand."

Bayley Serjt., objected to this affidavit as being made by the bankrupt, who could not take upon himfelf exprefsly to negative a tender which might have been made to his affignees. He cited *Smith* v. *Tyfon*, *ante*, vol. 2. p. 339.

1802.
SMITH v. BARCLAY.

Best Serjt. *contrà*, submitted that the assignees ought not to be called upon to make an affidavit, and referred to *Lawson* v. *M'Donald*, *ante*, vol. 2. p. 590. where the Court did not call upon the clerk of the peace, in whom the estate of an insolvent had been vested, and in whose name an action was commenced, to negative the tender.

The Court held the affidavit insufficient, and made the

Rule absolute (*a*).

(*a*) See *Percy* v. *Powell*, *ante*, p. 6. and *n.* (*a*), p. 7.

Nov. 13th.

WILKINS *v.* MARY WETHERILL and CHARLOTTE COUTTS.

If a feme covert be taken in execution, under a warrant of attorney given by her as a feme sole, the Court will not discharge her on a summary application.

THIS was an application to the Court, calling on the Plaintiff to shew cause why the judgment signed in this case against *Charlotte Coutts*, one of the Defendants, and the writ of execution thereon, should not be set aside for irregularity, and the sum of 42*l.* 17*s.* 6*d.* levied thereon, be restored to her.

The ground of this application was, that the judgment was entered up on a warrant of attorney given by *Charlotte Coutts* jointly with *Mary Wetherill*, the other Defendant, the former being a feme covert at the time when the warrant was given. It appeared from the affidavits that *Mary Wetherill*, who was a widow and the mother of *Charlotte Coutts*, having been arrested for a debt, the latter joined with her in a warrant of attorney to confess judgment, in order to obtain her mother's discharge; that the Plaintiff was not apprized that *Charlotte Coutts* was a *feme covert*: and that having entered up judgment on the warrant of attorney, *Charlotte Coutts* was taken in execution, whereupon her husband paid the debt.

Praed Serjt., being called upon to support the rule, contended that *Charlotte Coutts*, being a *feme covert*, her deed was absolutely void: and he cited the case of *Saunderson* v. *Marr*, 1 *H. Bl.* 75. where the Court set aside a judgment on a warrant of attorney given by an infant, though he had promised not to take advantage of his infancy.

The Court said it was very evident that the case of *Saunderson* v. *Marr*, proceeded on the ground of the Plaintiff being apprised

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1802.

WILKINS v. WETHERILL.

that the Defendant was an infant at the time that he gave the warrant of attorney, whereas in this case the Plaintiff was not apprised that *Charlotte Coutts* was a *feme covert* at the time the warrant of attorney was given. They observed that it had been repeatedly decided that the Courts would not assist a *feme covert* in a summary way who obtained credit by acting as a *feme sole* (a); and that *Charlotte Coutts* therefore must resort to her writ of error.

Rule discharged (b).

(a) See *De Gaillon* v. *L'Aigle*, ante, vol. 1. p. 8. and the note to that case. Also *Pearson* v. *Meadon*, 2 *Bl.* 903. *Partridge* v. *Clark*, 5 *T. R.* 194. and *Waters* v. *Smith*, 6 *T. R.* 451. But where a feme covert obtained credit upon a mistaken representation that her husband was dead, the Court of *K. B.* discharged her upon common bail, because no fraud was intended. *Pitt* v. *Thompson*, 1 *East*. 16. And the same was done in *March* v. *Capelli*, where the husband was abroad, though upon terms of separation. *Id.* p. 17.

(b) See also *Maclean* v. *Douglas*, ante, p. 128.

PIGOTT and Another *v.* TRUSTE.

Nov. 16th.

If a plaintiff, having taken an assignment of the bail-bond while the action is pending, proceed upon it after the cause is out of court, the proceedings cannot be set aside for irregularity. But the Court will stay such proceedings, if it appear that the plaintiff has been guilty of laches.

THIS was an application calling upon the Plaintiffs to shew cause why the assignment of the bail bond and the proceedings thereon (if any had been had), should not be set aside for irregularity. The application was made on the behalf of the bail on *affidavit* stating, that the action was commenced against the Defendant so long ago as the 8th *June* 1801; that the bail-bond was immediately given to the sheriffs of *London*; that shortly after this an arrangement between the parties took place; and that the bail never heard any thing more of the action until the 6th of *October* last, when they were served with process at the suit of the Plaintiffs, as assignees of the sheriff. It was also sworn that no declaration was filed either in the term in which the action was commenced, or in the *Michaelmas* term following; and also that no rule for time to declare was obtained either in the said *Michaelmas* term, or in *Hilary* term following. On the part of the Plaintiffs, it was sworn that in *Trinity* term 1801, bail above not being put in within due time, they took an assignment of the bail bond, on which they were now proceeding.

Bayley Serjt. shewed cause, and insisted that the Plaintiffs were perfectly regular in their proceedings, for that having taken an assignment

1802.
PIGOTT v. TRUSTE.

ſignment of the bail bond in *Trinity* term 1801, while the action was pending in the court, they had thereby acquired a right of action under the ſtatute, and conſequently were entitled to proceed. He obſerved that on this ground the caſe was diſtinguiſhable from that of *Sparrow* v. *Naylor*, 2 *Bl.* 876. where the Court ſtayed proceedings on a bail bond which had been aſſigned after the cauſe was out of court.

Shepherd Serjt., in ſupport of the rule, argued that the circumſtance of having taken the aſſignment within due time could make no difference, as the plaintiffs had omitted to proceed within due time; and that if a contrary practice were to prevail, the bail would be liable at any indefinite period, though they had been induced by the *laches* of the plaintiff to ſuppoſe the action completely at an end, and had been thereby deprived of the opportunity of applying to the Court for leave to put in bail above upon terms, or of rendering the defendant. He obſerved that the reaſon why the action on the bail bond muſt be brought in the court where the original action was commenced, is, that the Court may be able to regulate proceedings upon the bail bond in ſuch a way as to do juſtice to the parties; and that the ground upon which the Court proceeded in *Sparrow* v. *Naylor*, was, that as ſoon as the cauſe is out of court, the Court ceaſes to have juriſdiction over the bail bond.

The Court were of opinion that the preſent rule could not be ſupported, it being moved on the ground of irregularity: for the aſſignment having been taken in due time, the plaintiffs were perfectly regular in their proceedings. They ſaid that this caſe differed eſſentially from that of *Sparrow* v. *Naylor*, becauſe the aſſignment in that caſe having been taken after the cauſe was out of court, was a mere nullity (*a*), whereas here the aſſignment having been taken within time, the Plaintiffs ſo far were right. They added, however, that both caſes were pregnant with the ſame inconvenience, and if the bail applied to the equitable juriſdiction of the Court, they ſhould find no difficulty in ſtaying the proceedings on the bail bond in this and in all other caſes where it ſhould appear that the plaintiffs had by their neglect forfeited their claim to inſtitute proceedings againſt the bail.

Rule diſcharged.

(*a*) The words of 4 *Anne*, c. 16. ſ. 20. are "the ſheriff or other officer at the requeſt and coſts of the plaintiff *in ſuch action or ſuit*, or his lawful attorney ſhall aſſign," &c.

RATCLIFFE *v.* BURTON.

Nov. 18.

Semb. that a sheriff's officer acting under civil process may justify breaking the inner doors of the defendant's house, tho' he be not therein at the time. But in such case the officer must first demand admittance.

TRESPASS for breaking and entering the dwelling-house of the Plaintiff, and making a great noise and disturbance, &c. there, and forcing and breaking open, breaking to pieces, damaging and spoiling the doors and windows and the locks, bolts, bars, staples, and hinges thereto affixed.

Plea as to the supposed trespasses, that before the said time when, &c. a writ of *alias latitat* issued out of the *King's Bench*, directed to the sheriffs of *London*, by which they were commanded to take the Plaintiff, if he should be found in their bailiwick, and safely keep him, &c. so that, &c.; that the said writ was indorsed for bail for 30*l.* and before the said time when, &c. was delivered to the said sheriffs, who directed their warrant to the Defendant and one *J. A.* as serjeants at mace, and thereby commanded them to take the Plaintiff to answer, &c. "which said warrant afterwards and before the return of the said writ, and before the said time when, &c. to wit, on the day and year last aforesaid, in the parish aforesaid, was delivered to the said Defendant, to be executed in due form of law, by virtue of which said warrant the said Defendant, as such serjeant at mace as aforesaid, afterwards and before the time for the return of the said writ, to wit, at the same time when, &c. and within the bailiwick of the said *William Rawlins* and *Robert Albion Cox*, as such sheriffs as aforesaid, peaceably and quietly entered into the said dwelling-house, in which, &c. the outer door thereof then and there being open, in order to take and arrest the Plaintiff under and by virtue of the said writ and warrant, as it was lawful for him to do, for the cause aforesaid, and in order to arrest the said Plaintiff, and by virtue of the said writ and warrant, did then and there necessarily and unavoidably make a little noise and disturbance in the said messuage or dwelling-house, and stay and continue therein making such noise and disturbance for the said space of time in the said declaration mentioned, and because at the said time when, &c. the said Plaintiff not having been taken and arrested under or by virtue of the said writ or warrant, and the entrance of divers, to wit, ten of the rooms and apartments of the said dwelling-house, and of and belonging to the same, being fastened and stopped up by and with the said doors, windows,

1802. RATCLIFFE v. BURTON.

locks, bolts, bars, ſtaples, and hinges, in the introductory part of this plea mentioned, ſo that without forcing and breaking open the ſame the ſaid Defendant could not at the ſaid time when, &c. ſearch for or arreſt the ſaid Plaintiff in the ſame rooms and apartments he the ſaid Defendant at the ſaid time when, &c. in order to ſearch for, find, and arreſt the ſaid Plaintiff, under and by virtue of the ſaid writ neceſſarily forced and broke open the ſaid doors, windows, locks, bolts, bars, ſtaples, and hinges, and in ſo doing neceſſarily and unavoidably a little broke to pieces, damaged and ſpoiled the ſame, doing as little damage as he poſſibly could on the occaſions aforeſaid, which are the ſeveral ſuppoſed treſpaſſes in the introductory part of this plea mentioned, whereof the ſaid Plaintiff hath above in his ſaid declaration in that behalf complained againſt him, and this, &c. wherefore, &c."

To this plea there was a general demurrer and joinder therein.

Bayley Serjt., in ſupport of the demurrer. There are two objections to this plea; 1ſt, It does not ſtate that the Plaintiff was in his houſe at the time when the Defendant entered; 2dly, It does not aver that the Defendant before he broke open the inner doors, locks, &c. of the Plaintiff's houſe, made any demand of leave to enter, nor does it ſhew any particular circumſtances which rendered that breaking neceſſary. With reſpect to the 1ſt point, a ſheriff's officer acting under a *capias* has no authority to enter the houſe of a party who is not in the houſe at the time. If an officer enter a houſe for the purpoſe of arreſting any perſon, he acts at his peril, and is juſtified or not according to the event of the perſon being there or not. Although there be no authority expreſsly in point, there are many which bear ſtrongly upon the ſubject. In *Boldringſhaw* v. *Rag*, *Cro. Eliz.* 876. the Defendant to an action of treſpaſs pleaded that the Plaintiff was indebted to him in ſuch a ſum, and by licence of the Plaintiff's ſervant, the door being open, he entered to demand his debt; upon demurrer this was adjudged no plea, "eſpecially it being not averred that the maſter, who was the debtor, was then within the houſe; but *Gawdy* conceived that if it had been averred that the maſter was then within the houſe, the plea had been good." There indeed the Defendant was not acting under proceſs, but the caſe diſtinctly recognizes the principle that a treſpaſs may be juſtified or not, according to the event of the party being found within the houſe or not. Upon the ſame

 principle

principle where a Defendant justified entering the Plaintiff's house under a *fi. fa.* to levy *de bonis Philip Biscop testatoris* in the hands of *Lucretia Biscop*, his executrix, and averred that the executrix was in the Plaintiff's house *cum bonis suis* and there abiding, it was adjudged to be a bad plea, because it did not aver that *bona testatoris* were in the house; but if *bona testatoris* had been there, the entry had been justifiable, *Biscop* v. *White*, *Cro. Eliz.* 759. So in *Bennet* v. *Gray*, 2 *Roll. Ab.* 564. *Vin. Ab. Trespass*, *H.* a. *pl.* 1. *S. C.* it was decided that a sheriff could not enter the house of *J. D.* and there break a chest of *J. N.*, after demand of the keys to seek *J. S.* his prisoner, who had escaped from arrest, "but he ought to take it upon him that he was in the chest." To the same effect is *Stanhope* v. *Dawson*, 2 *Lutw.* 1428, where exception was taken to a justification for entering the Plaintiff's house under a writ of *homine replegiando* of one *W. Laycock*; that the Defendant could not enter the house, unless the person to be replevied were there at the time, though it had been expresly averred that *Laycock* was eloigned to the said house. It is true that there were other objections to the justification, and the reasons of the judgment do not appear, but *Lutwyche* himself observes that the above was a strong objection. Another case, in which it has been holden that the justification of the party may depend upon the event of the search, is *Bostock* v. *Saunders*, 2 *Bl.* 912: where an Excise officer was held liable to an action of trespass for breaking the Plaintiff's house under a warrant of the commissioners to search for uncustomed goods. It is true that the case of *Bostock* v. *Saunders* was overruled in that of *Cooper* v. *Booth*, *Trin.* 25 *Geo.* 3. *K. B.* 3 *Esp. N. P. Cas.* 135. cited in *Johnstone* v. *Sutton*, 1 *T. R.* 535. and in *Price* v. *Messenger*, *ante*, vol. 2. 160. But it was overruled on the ground of the 10 *Geo.* 1. having been misconstrued, not upon any objection to the general principle of law. It is laid down in 2 *Hale*, *P. C.* 151. that "upon a search for stolen goods, if the goods be not in the house, yet the officer is excused, because he searcheth by warrant," but it seems the party that made the suggestion is punishable in such case; for as to him, the breaking of the door is *in eventu* lawful or unlawful, viz. lawful if the goods are there, unlawful if not there. Now by a *capias* the officer is not directed to take the party in any particular house, as in the case of a search warrant, but his authority is general, and he therefore stands in the same situation

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1802.
RATCLIFFE v. BURTON.

as the party mentioned by Lord *Hale*, the legality of whose acts depends upon the event. 2dly, A sheriff's officer has no authority to break open the inner doors of an house without first making a demand of admittance. It was expresly determined in *Semayne*'s case, 5 *Co*. 91. that "in process where the King is party, the sheriff cannot break open the outer door of a house without first signifying the cause of his coming, and making request to open the doors;" "for the law, without default in the owner, doth abhor destruction or breaking of any house which is for the habitation and safety of a man, by which great damage and inconvenience may follow to the party when no default is in him, for perhaps he doth not know of the process, which if he hath notice of, it is presumed that he will obey it, and that appeareth in 18 *Ed*. 2. *Execution* 252 (*a*), where it is said that the King's officer who cometh to do execution, &c. may open the doors which are shut, and break them if he may not have the keys, which proveth that he ought first to demand them." This law is confirmed, 2 *Hale*, *P. C.* 117. where it is said that upon warrant to apprehend a felon, the officer must first notify his business that he comes about, and demand admission, whether it be the house of the felon or that of a stranger. And the same he observes of a warrant of the peace. And in p. 151. it is said that upon warrant to search for stolen goods, if the door be shut, and upon demand it be refused to be opened by them within, if the goods be in the house, the officer may break open the door. These authorities establish that where the officer is entitled to break open the outer door, he must first demand admittance; from which it seems to follow, that where he is only entitled to break open an inner door, he ought to do the same, since the same reasons apply to both cases (*b*). In addition to what has already been cited from *Semayne*'s case, it may be observed that it was there expresly decided that notice of the process of the law ought to be certainly and directly alleged in pleading, and that a general allegation, such as

(*a*) *Fitzh. Ab.* in which pl. 252, is misprinted for pl. 152. But *Fitzh.* refers to 18 *Ed*. 2 instead of 18 *Ed*. 3.

(*b*) If the Defendant take refuge in the house of another, the sheriff may break open the outer door in order to take him; for "the house of any one is not a castle or privilege but for himself." *Semayne*'s case, 5th *Rep*. *Fost. Crown Law*, tit. *Homicide*, c. 8. *s*. 21. p. 320. 2 *Hale*. *P. C.* 117. But by the same authorities it appears that before the sheriff breaks the house he must demand admission.

præmissorum non ignarus, was not sufficient. Now in the present plea the allegation is merely that the Defendant *necessarily* forced and broke open the doors, which is as general as possible. 1802. RATCLIFFE *v.* BURTON.

Best Serjt., in support of the plea. 1st, It is admitted that there is no express authority which decides that a sheriff's officer acting under civil process becomes a trespasser by entering a Defendant's house if the Defendant be not there; and the Court will be extremely cautious of laying down such a proposition for the first time, since it is impossible for the officer to execute his writ without making diligent search in that place where the Defendant is most likely to be found, *viz.* in his own house. The case of *Holdringshaw* v. *Rag*, has no application to the present, since it turned upon the validity of the licence to the servant; besides which it may be observed that the case is not law, since it is now holden that a man may enter the house of another to demand his debt. With respect to the cases of *Bishop* v. *White*, *Bennet* v. *Gray*, and *Stanhope* v. *Dawson*, it may be observed generally that they related to the houses of strangers, where the sheriff certainly enters at his peril. According to the report of *Bostock* v. *Saunders*, in 3 *Wils.* 434., *De Grey* Ch. J., in stating his reasons for holding the officer of Excise liable, says, "the case of a sheriff's bailiff is very different from this; the bailiff is bound to execute the sheriff's warrant, the officer of Excise is the party promoting and acting for his own benefit under an authority which he has obtained by his own oath, and he is not bound to obey like a sheriff's officer." Admitting that case therefore to be an authority, yet in the present instance the bailiff is not liable, for the very reasons stated in that case; and though that case was certainly overruled in *Cooper* v. *Booth*, on the construction of the act of parliament, yet the general rules of law there laid down remain unimpeached; and the principle of *Cooper* v. *Booth* establishes that where an officer acts under the authority of a warrant, he is justified in endeavouring to execute that warrant, though nothing be found, the act itself being legal. Upon the same ground it is laid down 2 *Hale*, *P. C.* 151, that upon a search warrant, if the goods be not in the house, yet the officer is excused though the party who made the suggestion is punishable. In the case of *White* v. *Whitshire*, *Palm.* 52. it was agreed that where an officer justifies breaking the inner door of an house under a *fi. fa.* he need not aver that there were any goods there, for he cannot know this before his entry, and it shall be intended that a man has sufficient goods.

1802.

RATCLIFFE v. BURTON.

In the case of a stranger's house, it seems that it ought to be averred that there were goods. *Com. Dig. tit. Execution* (*C.* 5). With respect to the 2d point, if it appear to have been necessary to the execution of the warrant to break the inner doors, &c. the officer was justified in so doing. Now it is averred in the plea, that because the Defendant could not search for and arrest the Plaintiff without forcing and breaking open the inner doors, &c. he the Defendant, in order to search for, find, and arrest the Plaintiff, under and by virtue of the said writ, necessarily forced and broke open the same. This averment shews that the force was not wantonly employed, but was necessary to the execution of the writ; the necessity is admitted by the pleadings; and if the Defendant exceeded his authority, the Plaintiff should have put that fact upon the record by a new assignment. With respect to the authorities which have been cited on this point, it may be observed that they all apply to the outer door of the house, the rules of law respecting which are very distinguishable from those which apply to the inner door of the house. In *Lee* v. *Gansell*, *Cowp.* 7. Lord *Mansfield*, after stating the distinction between the outer and the inner door, cites the following passage from *Fost. C. C. tit. Homicide*, *c.* 8. *f.* 20. (*a*) with approbation; "the rule, that every man's house is his castle, when applied to the case of arrests upon legal process, hath been carried as far as the true principles of political justice will warrant; perhaps beyond what in the scale of sound reason and good policy they will warrant; but in cases of life we must adhere to rules well known and long established; but this rule is not one of those that will admit of any extension; it must therefore, as I have before hinted, be confined to the breach of windows and outward doors intended for the security of the house against persons from without endeavouring to break in."

Lord ALVANLEY Ch. J. I think we may determine this case without entering into the great question which has been raised, Whether a sheriff's officer may justify entering the house of a person against whom he has civil process, to ascertain whether he be there or not? My own opinion is, that he may. I will therefore suppose that the sheriff's officer has a right to enter in a peaceable manner, in order to satisfy himself whether the person mentioned in the writ is to be found in his own house within the bailiwick.

(*a*) P. 319.

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1802.

RATCLIFFE v. BURTON.

The next queſtion is, Whether an officer who enters for this purpoſe without any particular reaſons for ſuppoſing the party to be within his houſe, has a right to act in the manner in which the Defendant upon this record appears to have acted: whether he has a right to break open ſuch inner doors as may happen to be ſhut, without any previous demand of admittance? If the officer have certain knowledge that the party is within the houſe, it might be abſurd for him to demand any admittance; ſince if he were to do ſo, the party might poſſibly eſcape by the window while the officer was demanding admittance at the door. No authority has been cited to ſhew that where the officer enters merely for the purpoſe of aſcertaining whether the party be there, he can juſtify violence for that purpoſe without a previous demand of admittance. It would be carrying the law upon this ſubject to an alarming extent, if the Court ſhould hold that becauſe a man happens to owe money in any part of *England*, the ſheriff of the county in which his houſe is ſituated may break open every door and every trunk in which a man might be concealed, and this as often as he ſhould think proper before the return of the writ. It appears to me that the law has gone quite far enough upon this ſubject. It has ſaid that the outer door of the houſe is the man's caſtle, but that the inner doors may be broken open for the execution of civil proceſs. It has never ſaid, however, that the officer may juſtify breaking the inner doors without averring a previous demand of peaceable admittance, or ſhewing why ſuch violence was neceſſary. Without ſuch averment, it does not appear that he did nothing more than was neceſſary towards making a reaſonable ſearch. In this caſe the Defendant neither ſtates that the party was there, nor even that he had reaſonable ground of ſuſpicion. Had either of theſe circumſtances been ſtated, I do not ſay that he would have been guilty of a treſpaſs. I deſire to be conſidered as confining theſe obſervations to the caſe of civil proceſs only, without in any degree extending them to the caſe of criminal proceſs. The preſent therefore being a caſe of civil proceſs, I do not think the juſtification ſtated by the Defendant ſufficient to entitle him to the judgment of the Court.

HEATH, J. I am of the ſame opinion. This plea appears to me to be bad, becauſe it ſtates no demand of admittance; and I ſhall give my opinion on that point alone. *Semayne*'s caſe is a direct authority upon the ſubject. By the ſixth reſolution of that caſe, it appears that it is not only neceſſary for the officer to make a demand,

1802. RATCLIFFE v. BURTON.

mand, but that the demand must be pleaded; and for want of such an averment the Plaintiff there was prevented from recovering. The law of *England*, which is founded on reason, never authorises such outrageous acts as the breaking open every door and lock in a man's house without any declaration of the authority under which it is done. Such conduct must tend to create fear and dismay, and breaches of the peace by provoking resistance. This doctrine would not only be attended with great mischief to the persons against whom process is issued, but to other persons also, since it must equally hold good in cases of process upon escape, where the party has taken refuge in the house of a stranger. Shall it be said that in such case the officer may break open the outer door of a stranger's house without declaring the authority under which he acts, or making any demand of admittance? No entry from the books of pleading has been cited in support of this justification, and *Semayne*'s case is a direct authority against it.

ROOKE, J. I am of the same opinion. Without referring at all to the case of criminal process, I shall give my opinion solely upon these two questions, whether a sheriff's officer, having entered a house peaceably under civil process, can justify breaking an inner door, without making a previous demand of admittance; and whether enough is stated upon these pleadings, from whence it may be inferred that such demand was made, or that it may be dispensed with. I am of opinion that the necessity of breaking the doors is not sufficiently stated to dispense with the demand. It is not shewn why the Defendant could not have made his search without breaking open the doors, provided he had made a demand. I must take it for granted therefore upon these pleadings that no demand was made. What a privilege will be allowed to sheriffs' officers if they are permitted to effect their search by violence, without making that demand which possibly will be complied with, and consequently violence be rendered unnecessary? With respect to the case of *Lee* v. *Gansell*, nothing turned upon the want of notice, nor the mode of breaking. The question was not whether a trespass had been committed, but whether the officer having found General *Gansell*, the latter was entitled to be discharged on summary application. The general assertion of Lord *Mansfield* must be taken with reference to the particular case before him, not as affecting a case which was not even touched upon in argument. That case therefore affords no authority for the Defendant; and *Semayne*'s

 case

case on the contrary expressly decides that a demand must be made and stated with sufficient certainty. The case of 18 *Ed.* 3. referred to in *Semayne's* case is still more in point, for it is there stated in terms that the officer must first demand the keys. On these pleadings therefore I have no hesitation in saying that judgment must be given for the Plaintiff.

Chambre, J. Not having been present at the whole of the argument, I shall content myself with saying that I concur in opinion with the rest of the Court upon the second point; namely, that the breaking of the inner doors of the house is not justified by this plea. It would be mischievous indeed if such a latitude were allowed to sheriffs' officers as that which is now claimed. It lies on the party claiming such a right as that of breaking the doors of a house, to shew upon what grounds he does so. It is said that the Defendant's acts were necessary to the execution of the process; and that they appear to have been so by these pleadings. But the Court requires that the circumstances from which that necessity arises should be stated. This the Defendant has not done. I have therefore no doubt that judgment ought to be given for the Plaintiff.

Judgment for the Plaintiff. (*a*)

(*a*) Though no decided case is to be found upon the point here determined, there is an expression in *White* v. *Whitshire*, *Palm.* 54. which shews the opinion of two Judges in the 17 *Jac.* 1. that the sheriff ought to demand admission before he breaks open an inner door. "*Dodderidge* and *Haughton* said that if the sheriff be in one room, he may break open another upon having been refused admittance."

(IN THE EXCHEQUER CHAMBER.)

Lewis v. Legh in Error.

Nov. 18th.

This was an action of debt on a resignation bond given by the master of a public school. (For the pleadings, argument, and judgment in the King's Bench, see 1 *East* 391.)

Manley was this day to have argued for the Plaintiff in error, and *Giles* è *contrà*;

But *The Court* were clearly of opinion that it did not sufficiently appear upon the record that the office of schoolmaster, to which the Plaintiff in error had been appointed was such an office as ought,

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1802. Lewis v. Legh.

for the sake of the public, to be deemed a freehold office, and that it was therefore impossible to raise the important question which it was the intention of the parties to litigate; upon which question they declined giving any opinion.

Per Curiam, Judgment affirmed.

Nov. 19th.

Harding *v.* Hennem.

If *A.*, being arrested by *B.* on process of this Court, give bail to the sheriff, and before the return of the writ being again arrested by *C.* is committed to the *Fleet* prison, after which and before the return of the first writ, *B.* takes an assignment of the bail-bond and proceeds thereon, the Court will stay such proceedings, but will not make *B.* pay costs, for they will not try upon affidavit whether he knew or not, that *A.* was in custody, but will consider him ignorant of that fact unless notice of surrender has been regularly given.

The Defendant having been arrested on a writ returnable on the morrow of the *Holy Trinity*, at the suit of the Plaintiff, gave bail to the sheriff; soon after this, *viz.* on the 11th of *June*, and before the return of the first writ, he was again arrested by the same sheriff, at the suit of some other person, and not being able to procure bail, was removed by *habeas corpus* and *committitur* to the *Fleet*; of his being thus removed and committed no notice was given to the Plaintiff, who for want of bail above being regularly put in and perfected, took an assignment of the bail bond.

Upon this an application was made to the Court to set aside the assignment of the bail-bond and subsequent proceedings thereon (if any) for irregularity, and also to order the bail-bond to be delivered up to be cancelled, on the ground of the Defendant having been charged in the custody of the Warden of the *Fleet*, in this action, before the return of the writ. In support of the application an affidavit was made, the object of which was to shew, that though no notice had been given to the Plaintiff of the Defendant having been charged in custody, yet that he knew it at the time he took the assignment of the bail bond. This knowledge was on the part of the Plaintiff denied, and the fact remained doubtful.

Clayton Serjt. shewed cause, and relied on his affidavit, denying the knowledge of the Defendant's being in custody when the assignment was taken, and also on the established practice of the court requiring a notice of the surrender of the Defendant in all cases before the proceedings of the Plaintiff can be affected by such surrender.

Bayley Serjt., in support of the rule, commented upon the affidavit, and insisted that if the Court saw that the Plaintiff was informed of the surrender, they would dispense with the notice usually required, the necessity for such notice not existing in such a case.

Lord

Lord ALVANLEY Ch. J. seemed to think that the affidavits had brought home to the Plaintiff the knowledge of the Defendant's surrender previous to his taking an assignment of the bail-bond, and was therefore inclined to hold the notice unnecessary. But *Heath*, *Rooke*, and *Chambre* Js. were of opinion that the Court ought not to depart from the settled rule of practice, requiring a notice of the surrender; that rule having been established in order to preclude the necessity of deciding upon such contradictory affidavits as had been exhibited in the present case.

Accordingly *The Court* only stayed the proceedings upon payment of costs.

KENT *v.* HUSKINSON.

Nov. 19th.

A. having sent to *B.* a bale of sponge under a verbal order from the latter, for which he charged 11*s.* per pound; *B.* returned it, and at the same time wrote a letter to *A.* stating that he had examined the sponge, and finding that it was not worth more than 6*s.* per pound he had sent it back. Held that this letter did not amount to such an acceptance of the goods as would take the case out of the statute of frauds.

THIS was an action for goods sold and delivered, and was tried before Lord *Alvanley* Ch. J. at the *Westminster* sittings in this term, when the following circumstances appeared in evidence. The subject of the action was a bale of sponge sent by the Plaintiff, a wholesale dealer in that article, residing in *London*, to the Defendant, a retail dealer residing in *Staffordshire*. Some short time before the sponge was sent by the Plaintiff, he had been at the place where the Defendant resided, and had received from him a verbal order, under which he had acted in sending the sponge, and the price charged was 11*s.* *per* pound, amounting altogether to 75*l.* Soon after the sponge was sent, the Defendant wrote the following letter to the Plaintiff: "After receiving a letter from your house in town, stating the bale of sponge was sent by your direction, I called in a friend or two who are competent judges of the article, and asked them to say, according to the present price of sponge, what it was worth; the answer was, not more than six shillings *per* pound; have therefore returned it to you by the same conveyance it was forwarded by to this place. In future will select what sponge I may want personally, otherwise will appoint some confidential friend for that purpose." The Plaintiff's son being at the Defendant's house soon after the sponge was returned, was told by him that he had resolved not to keep the article, because it was not so good as he had expected. It was objected for the Defendant that inasmuch as this was a contract for the sale of goods of more than 10*l.* value, the case fell within the 17th section of the statute of frauds

1802. KENT *v.* HUSKINSON.

frauds (*a*), for want of a note or memorandum in writing, and consequently the Plaintiff could not recover. His Lordship being of this opinion, nonsuited the Plaintiff.

Shepherd Serjt. now moved to set aside that nonsuit, and relied on the words of the 17th section of the statute of frauds, which declares contracts for the sale of goods void, "except the buyer shall accept part of the goods so sold, or actually receive the same," within which exception he contended the present case fell, for that the object of the statute was either that there should be a contract in writing, or that some act should be done by the party as evidence of his having received the goods; the latter of which objects he insisted was satisfied by what had taken place in the present case, for that though the Defendant had not accepted the bale of sponge without any qualification or right reserved to himself of disputing the quality of the article sent, yet within the meaning of the statute, and with this reserved right of disputing the quality he had *accepted*, as was evidenced by his opening the bale and subjecting it to the examination of his friends. He urged that the Defendant by his conduct had affirmed the order previously given, and only denied that the order was well complied with, which was a matter for the consideration of the jury, and observed that it was not within the letter or spirit of the statute of frauds to hold that there must be a note or memorandum in writing of every sale of goods where the vendee does not accept them absolutely and in such a way as to preclude himself from returning them in any case:

Lord ALVANLEY Ch. J. At the trial I thought, and still continue of opinion, that the evidence does not take this case out of the statute of frauds. How is any judgment to be formed as to the nature of the contract between these parties? Possibly the order was for the best, possibly for the second best sponge, or sponge of some peculiar quality; all which circumstances are left in a state of uncertainty. It was this very uncertainty, and the frauds to which it might lead, that the statute had in contemplation and meant to guard against. The only affirmance of any contract to be collected from the evidence is an affirmance of some sort of order for some sort of sponge, and it appears that the moment the article reached the Defendant and was examined, he sent it back to the Plaintiff,

(*a*) 29 *Car.* 2. c. 3.

ſaying it was not that ſort of ſponge which he wanted and had ordered. The Defendant's letter cannot, as it appears to me, be conſtrued into any thing like an acceptance, ſo as to bring this caſe within the exception which has been relied on.

HEATH J. I think my Lord was perfectly right in his conſtruction of the ſtatute, and in the opinion which he formed of the evidence relied on by the Plaintiff in this caſe, with a view to bring it within the exception. According to the words of the ſtatute, the exception does not apply, unleſs the vendee both receive and accept. Now that acceptance I cannot conſider to be any other than the ultimate acceptance, and ſuch as completely affirms the contract. What the nature of this order was, or under what circumſtances it was given, was not proved. Poſſibly the ſponge was ſent down upon ſpeculation only.

ROOKE J. I am of the ſame opinion. It does not appear to me that there was ſuch an acceptance by the Defendant as has been contended.

CHAMBRE J. The caſe appears to me to be too clear to require any further obſervation. Certainly there was no acceptance of the goods by the Defendant, unleſs we can conſider a refuſal to accept as amounting to an acceptance.

Shepherd took nothing by his motion.

BRAND and HERBERT *v.* BOULCOTT.

Nov. 20th.

A., *B.*, and *C.* being appointed aſſignees under a commiſſion of bankrupt, and having acted as ſuch, *A.* and *B.* pay each half of his bill to the ſolicitor. Held that *A.* and *B.* could not maintain a joint action againſt *C.* for his proportion of the money paid, but muſt each bring a ſeparate action.

INDEBITATUS aſſumpſit for money paid, laid out, and expended to the uſe of the Defendant. The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* ſittings after laſt *Trinity* Term.

The Plaintiffs having ſued out a commiſſion of bankrupt againſt *T. L.* as joint petitioning creditors, were choſen aſſignees under that commiſſion together with the Defendant; and both the Plaintiffs and the Defendant acted as aſſignees under the commiſſion. Each of the Plaintiffs paid to the ſolicitor under the commiſſion the ſum of 104*l.* in diſcharge of his bill for expences incurred on account of the bankruptcy, and the preſent action was brought to recover the Defendant's proportion of the 208*l.* paid by the Plaintiffs. It was objected at the trial that ſeparate actions ought to have been brought by each of the Plaintiffs for contribution from the Defendant.

1802. BRAND and Another v. BOULCOTT.

fendant. Lord *Alvanley* being of this opinion nonfuited the Plaintiffs.

A rule *nisi* having been obtained on a former day for fetting afide this nonfuit,

Shepherd Serjt. now fupported the rule. This cafe differs materially from that of an action for contribution by two out of three co-obligors of a bond; there, if two pay the debt, each muft fue feparately for his fhare againft the third; for as between themfelves they are never jointly liable. But where three perfons are in partnerfhip, and two pay a partnerfhip debt, the third is not liable to each feparately, but to the partnerfhip; thus, if three perfons agree to enter into partnerfhip, and bring into the joint fund 1000 *l.* each, and two advance 1000 *l.* each, but the third advances nothing, he will be liable to the partnerfhip to that amount, and not to each of the partners. So in this cafe, the 208 *l.* was due to the Plaintiffs jointly, and not 104 *l.* to each feparately; therefore the action was properly commenced by both for the whole fum.

Bayley Serjt. *contrà.* If the rule contended for be juft, it muft equally hold good where two partners have advanced money for a third in unequal proportions. Now fuppofe one partner to have advanced 5000 *l.* and another only 5 *l.*, and a third, who has advanced nothing, to have a debt againft the former to a large amount, if the two may owe the third who has advanced nothing for his proportion of 5000 *l.* and 5 *l.* jointly, the Defendant will be deprived of his fet-off. Where two perfons have each advanced money for a third, there is no doubt that they may fue feparately; and if they may alfo fue jointly, it will put it in their power to defeat the fet-off of the Defendant, by fuing jointly if his crofs-demand be feparate, and feparately if his crofs-demand be joint.

The Court were of opinion that the Plaintiffs could not maintain a joint action, and therefore the nonfuit ought to ftand.

Rule difcharged.

SOUTHEY and Another, Assignees of KEEVES a Bankrupt, *v.* BUTLER. *Nov.* 20th.

A trader, subsequent to an act of bankruptcy, being arrested and detained in prison at the suit of several creditors, sent for all his creditors but one, and paid their debts in full; but no other circumstance occurred from which it could be presumed that they knew of his bankruptcy or insolvency. Held that such payments were not protected by the 19 *Geo.* 2. *c.* 32.

THIS was an action for money had and received, brought with a view to contest a payment made by the bankrupt to the Defendant under the following circumstances.

On the 1st of *September* 1801, which was subsequent to an act of bankruptcy committed by *Keeves*, he was arrested in an action at the suit of the Defendant, and committed to the *King's Bench* prison; after this he was removed to the *Fleet*, charged with this and several other actions. On the 2d of *October* following he sent for all the persons at whose suit he was detained except one *Hiam Hart*, and paid them all, including the present Defendant, the full amount of their debts, and was discharged from their several suits; but no other circumstance occurred from which it could be presumed that the Defendant knew of the bankruptcy or insolvency of *Keeves* at the time when he received his debt. On the 4th of *February* 1802 a commission of bankrupt issued against *Keeves*, and on the 16th of the same month he was discharged generally from the *Fleet*.

The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* sittings after last *Trinity* Term, when the jury, under his Lordship's direction, found a verdict for the Plaintiffs.

A rule *nisi* for setting aside this verdict having been obtained on a former day,

Shepherd and *Bayley* Serjts. now supported the rule. This is a payment protected by the 19 *Geo.* 2. *c.* 32. which declares that payments made in the usual and ordinary course of trade and dealing, received by the creditor before notice of the bankruptcy or insolvency, shall be deemed valid, though in fact subsequent to an act of bankruptcy committed. By the case of *Cox* v. *Morgan*, *ante*, vol. 2. p. 398. it was decided that payments under legal process are within the protection of this statute. Now the present case falls within the same principle. The payment was made by the bankrupt in order to liberate himself from custody; and whether that were done to prevent an arrest in his own house, or discharge himself from actual confinement, can make no difference. If it be objected that he had no right to send for his creditors, it

 may

1802.

SOUTHEY v. BUTLER.

may be anſwered, that when once committed to priſon he has no other mode of obtaining his diſcharge; nor is his act more voluntary if he ſend for his creditors and pay them in order to get out of priſon, than if he pay them to prevent an arreſt. Both payments are made to avoid the inconvenience of confinement. The tranſaction between the bankrupt and his creditors in priſon by no means afforded evidence to them that he was in inſolvent circumſtances: for they did not know but that he was paying all his creditors; and it would be a ſingular inference to make, that becauſe a man ſent for his creditors and paid their debts in fu llhe muſt be in inſolvent circumſtances. The conduct of the Defendant afforded no more evidence of his knowledge of the bankrupt's inſolvency than that of any other creditor who obtains his debt by an arreſt. It may perhaps be urged, that as that was not paid, a fraudulent preference was given to the other creditors. But if one creditor by uſing legal diligence obtain payment of his debt, ſuch payment will be protected, though it operate to the prejudice of the others; and the bankrupt's knowledge of his own ſituation will not prevent ſuch creditor from retaining it under the proviſions of the ſtatute, if he himſelf were ignorant of the inſolvency or bankruptcy of his debtor.

Beſt Serjt. *contrà*, was ſtopped by the Court.

Lord ALVANLEY Ch. J. The only queſtion to be conſidered is, Whether this caſe falls within the deciſion of this Court in *Cox* v. *Morgan*? Without entering into any examination of the principles upon which that deciſion proceeded, it is perfectly clear that the only rule there laid down was, that if a man who is arreſted by a creditor *bonâ fide* uſing legal diligence for the recovery of his debt pay that debt in order to relieve himſelf from that arreſt, and without any intention of giving a preference to the creditor by whom he is arreſted, ſuch payment will be protected by the 19 *Geo.* 2. The preſent caſe, however, goes much beyond that of *Cox* v. *Morgan*. The queſtion here is, Whether a man who has been charged in cuſtody at the ſuit of ſeveral creditors, and detained in priſon for a conſiderable time, may, whenever he thinks proper, ſend for ſome of thoſe creditors and pay their debts, leaving the reſt of the creditors unſatisfied; even though ſuch a payment has not the effect of diſcharging him from priſon? If this were to be conſidered within the protection of the ſtatute, it would afford

1802.
SOUTHEY v. BUTLER.

to a bankrupt the means of giving that preference to favourite creditors which it is the object of the bankrupt laws to prevent.

HEATH J. The case of *Cox* v. *Morgan* is not applicable to this. The present is a clear case of undue preference.

ROOKE J. The case of *Cox* v. *Morgan* was decided on the special circumstances there stated. It was thought by more than one of the Court in that case, that the facts afforded ground from which it might have been inferred that the creditor knew of the insolvency of the bankrupt; but it was expressly stated in the case that he did not know of the insolvency or bankruptcy, and upon that ground the decision proceeded. In this case the bankrupt, being in prison, sends for a certain number of his creditors and pays them, omitting one at whose suit also he was charged in custody. Could a jury then have said that the creditors knew nothing of the distressed circumstances of the bankrupt? It appears to me to be a clear case of illegal preference.

CHAMBRE J. I am entirely of the same opinion. If we were to decide that the present payment is protected by the 19 *Geo.* 2. we might as well repeal the whole system of the bankrupt laws.

Rule discharged.

CLEGG and Another *v.* COTTON.

Nov. 22.

A., the agent in *America* of *B* in *England*, drew a bill upon him, and indorsed it to *C.*, also residing in *America*, who indorsed it over. Before the bill became due, *A.* having reason to believe that *B* would fail, lodged property belonging to *B.* in the hands of *C.* to answer the bill in case it should be returned, *C.* undertaking to restore the same whenever it should appear that he was exonerated from the bill. Acceptance and payment of the bill were refused, but no notice was given to *A.* Held that *A.* was discharged.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange, dated the 24th of *September* 1794, and drawn at *Charlestown* in *America*, upon one *Michael Cullen* of *Liverpool*, in favour of Messrs. *Miller* and *Robertson* of *Charlestown*, for 500*l.*, payable 90 days after sight. The cause was tried before *Chambre* J. at the last summer assizes at *Lancaster*, when the Plaintiffs were nonsuited under the following circumstances.

The bill in question having been indorsed by *Miller* and *Robertson* to the house of *Booth* and Co. in *America*, and by them to one *James Jacks*, also in *America*, was by him indorsed to the Plaintiffs, who were merchants at *Manchester*. *Cotton*, the drawer of the bill, was the agent of *Cullen*, the drawee, in *America*, and drew this bill in favour of *Miller* and *Robertson*, for goods purchased by him there. Soon after the bill was drawn, *Cotton* having rea-

1802. CIEGO *v.* COTTON. ſon to believe that *Cullen* was likely to become bankrupt, and fearing that the bill would be diſhonoured, lodged property in the hands of *Miller* and *Robertſon*, and *Booth* and Co., to anſwer the bill, in caſe it ſhould be returned; who gave him the following acknowledgment:

"We do acknowledge to have received from Mr. *L. Cotton*, the ſum of 2510 dollars, 55 cents, which we promiſe to hold forthcoming to him or his order, whenever it ſhall appear that we are exonerated from the payment of his bill for 500*l.* drawn by him on Mr. *Cullen* of *Liverpool*, in favour of *Miller* and *Robertſon*, and by us indorſed.

"19th *June* 1800. Miller and Robertſon.
"B. Booth and Co."

The bill was duly preſented for acceptance and payment, both which were refuſed, but no notice of ſuch refuſal was given to the drawer. The Defendant being arreſted upon the bill at *Liverpool*, ſaid that he ſhould apply to the aſſignees of *Cullen* to bail him, for that he had lodged property in *America* to anſwer the bill, which property, if he ſhould be diſcharged on account of the want of notice, he ſhould pay over to the eſtate of *Cullen*.

A rule *niſi* for ſetting aſide the nonſuit having been obtained on a former day in this term,

Cockell Serjt. now ſhewed cauſe. The only queſtion in this caſe is, whether any thing has been done to wave that want of notice of the non-acceptance and non-payment which was admitted at the trial. Now there ſeems to be nothing to diſtinguiſh this from the common caſe in which the drawer is diſcharged for want of notice: indeed it appears moſt clearly that the drawer had effects in his hands, and that if the bill had been preſented in *America*, it would have been paid.

Shepherd Serjt. in ſupport of the rule. The ſpecial circumſtances of this caſe take it out of the ordinary rule applicable to caſes where no notice has been given of non-acceptance or non-payment. The bill was drawn in *America*, and the drawer was at that time acting as the agent of the drawee. Now the converſation which took place at the time of the arreſt ſhews that the money which he lodged with the houſes of *Miller* and *Robertſon*, and *Booth* and Co., was the money of his principal, and that in conſequence of his having heard that the drawee was likely to fail, inſtead of remitting thoſe effects

1802.

CLUGO v. COTTON.

effects to him which might have provided for the payment of the bill, he retained them in *America* to indemnify the indorsees. This is the only inference to be drawn from the Defendant's observation, that he should not pocket the money himself, but pay it over to the assignees of the drawee. The bill therefore was drawn upon a person to whom the effects afterwards detained in *America* were to have been remitted as a fund for the payment of that bill; and if so, the same rule must apply as if the bill had been drawn upon a person having no funds. Possibly the circumstance of the funds being detained in *America* was the reason why acceptance was refused. If the money which was destined for the payment of the bill was kept back by the drawer in order to secure himself and the other indorsees in *America*, it cannot be contended that the drawer has sustained any injury from the want of that notice which he now sets up as a defence to this action upon the bill.

Lord ALVANLEY Ch. J. If I understand this case it is neither more nor less than this. The agent of *Cullen* in *America* having authority to draw upon him in *England*, drew the bill in question: but from an apprehension that it might not be paid, he afterwards lodged money by way of indemnity in the hands of *Miller* and *Robertson*, and *Booth* and Co., who were indorsees for a valuable consideration. It does not appear whether he had this money at the time when the bill was drawn, or whether he knew that it would not be paid; nor is there any evidence to shew that the bill was not to be paid unless the money was remitted from *America*. That fact has been assumed in argument in order to bring this case within the rule which has been adopted, that want of notice to the drawer shall not effect the right of the holder where there are no effects of the drawer in the hands of the acceptor. I lament that such a rule ever was adopted, and think it would have been better to have adhered to the old rule that want of notice discharged the drawer, without permitting parties to enter into the reasons why the drawer was not entitled to such notice. The utmost extent to which the decisions have gone, is, that a man who draws a bill without having any effects in the hands of the drawee, shall not be permitted to object to the want of notice of non-acceptance or non-payment. Is that the case here? The present bill was drawn by an agent upon his principal, and when acceptance was refused, the Plaintiff should have given notice thereof to the drawer. Clearly when the bill was drawn, the drawer was entitled to notice. Now

1802. CLIFF v. COTTON.

shall he, because after that time he deposited money in the hands of *Miller* and *Robertson*, and *Booth* and Co., to indemnify them against the return of the bill, be held to be deprived of that right to notice which he had when the bill was created? The want of notice might have induced *Miller* and *Robertson*, and *Booth* and Co., to pay back the deposit to the drawer, and the drawer might have paid it over to the drawee. There is nothing in this case from which fraud can be inferred; now it is on the ground of fraud that the Courts have proceeded in dispensing with notice. The Defendant being now sued in his character of drawer, I think he has a right to avail himself of the want of notice. There is nothing in this case to bring it within the decision in *Bickerdike* v. *Bollman* (a), and I am not willing to extend the principles of that decision.

HEATH J. I am of the same opinion. No doubt the rule dispensing with notice proceeds on the ground of a supposed fraud. But that ground is not applicable to a case where an agent draws upon his principal, unless under very particular circumstances. Had this bill been remitted to *America* immediately, it would probably have been paid out of the fund placed in the hands of *Miller* and *Robertson*, and *Booth* and Co.

ROOKE J. No sufficient reason has been assigned why notice was not given in this case. The Plaintiff only endeavours to support his own laches by saying, if notice had been given, it would have been of no consequence. It does not clearly appear that all the money paid into the hands of *Miller* and *Robertson*, and *Booth* and Co. is to be paid over to the assignees of the drawee, for possibly it may be subject to demands which the Defendant may have upon the estate of *Cullen*, as his agent.

CHAMBRE J. I see no reason for changing the opinion which I formed at the trial. It is not necessary to say whether the rule which dispenses with notice in cases where the drawer has no effects in the hands of the drawee were wisely adopted or not. That rule certainly proceeds upon the ground of fraud in the drawer: and the courts have said that where the drawer has been guilty of fraud he shall not claim the protection of those rules which were introduced for the benefit of drawers acting *bonâ fide*. When a person draws a bill upon another who has no effects in his hands, he is not intitled to notice of its being dishonoured, since he must

(a) 1 *T. R.* 405.

know

1802.
CLEGG
v.
COTTON.

know without ſuch notice that no funds have been provided to anſwer it. In the preſent caſe there is no pretence to charge the drawer with fraud. The Defendant drew upon *Cullen* in the character of agent, and no evidence has been adduced to ſhew that he had not a right to do ſo. It has been aſſumed for the purpoſe of the argument that he was to ſend over money to anſwer the bill. It is true that the drawee had effects in *America*; and that before the drawer knew what was become of the bill, he had reaſon to apprehend that it might probably be returned upon the indorſers. In conſequence of this apprehenſion he depoſited effects with the indorſers by way of indemnity, and I think it cannot be diſputed that thoſe effects belonged to the drawee, and that they were depoſited for the purpoſe of paying the bill. Now in what right did the drawer depoſit theſe effects? So long as he himſelf or the indorſers remained liable upon the bill, he had a right to retain effects to the amount of the bill againſt the aſſignees of *Cullen*, or to protect the indorſers by the application of that property; but the moment that by the laches of the holder he and all the indorſers were diſcharged, his right to diſpoſe of the property ceaſed, and he was bound to transfer it immediately to the aſſignees of *Cullen*. The acknowledgment of *Miller* and *Robertſon*, and *Booth* and Co., was to this effect: for they engage to return the depoſit as ſoon as they ſhould be exonerated from the payment of the bill. Now they were exonerated at the ſame time that the Defendant was exonerated: and conſequently from that moment the money depoſited belonged to the aſſignees of *Cullen*. The Defendant in ſaying that he intended to pay over the money to the aſſignees of *Cullen*, expreſſed his intention of doing nothing more than the law would have compelled him to do: for the law would have obliged him to account with the aſſignees. I think therefore that he was well adviſed in reſiſting the action upon this bill, for had he paid the amount after he had been once diſcharged by want of notice, he might poſſibly have been compelled to pay the money over again to the aſſignees of *Cullen*. (*a*)

Rule diſcharged.

(*a*) See *Whitfield* v. *Savage*, *ante*, vol. 2. p. 277. But in that caſe the indorſer, who had been furniſhed with money to anſwer the bill, paid over that money to the holder, notwithſtanding an intimation from the drawer to refuſe payment on account of the want of notice of non-payment by the acceptor.

1802.

Nov. 25th.

Borrowdale v. Hitchener.

If a verdict for a plaintiff be taken at *Nisi Prius*, subject to the award of an arbitrator, and the rule of reference be made a rule of court, the verdict may be entered according to the award of the arbitrator, without any application to the Court for that purpose. If in such case the award be made before the term, the Defendant can only impeach it within the four first days of term. Personal service of the award is not necessary to warrant the issuing of execution in such case, if the attorney of the Defendant has been served with the award.

In this case the parties having agreed at *Nisi Prius*, that a verdict should be taken for the Plaintiff for 150*l.* damages and 40*s.* costs, subject to the award of an arbitrator, to whom all matters in difference were referred, with a proviso that the arbitrator should make his award by the 1st day of this term, and the arbitrator having accordingly before the term made his award in favour of the Plaintiff for 113*l.*, and the rule of reference having been made a rule of court, the verdict was reduced according to the award, and judgment was entered up by the Plaintiff for that sum, together with his taxed costs, without any previous application to the Court for that purpose, and a writ of execution was sued out and executed. On a former day a rule *Nisi* was obtained by the Defendant, calling on the Plaintiff to shew cause why the writ of execution issued and the levy made thereon by the sheriff should not be set aside for irregularity with costs. The grounds of this application were; 1st, that the Plaintiff was not at liberty to reduce the verdict according to the award, without an express application to the Court for that purpose, and that he was premature in entering up his judgment before the end of the term. 2dly, That the execution was irregular, because the Defendant had never had personal notice of the award. The facts of the case as to the last point were, that the Defendant before the award made went into *Scotland*, and had not returned since; but it appeared that his attorney had been served with notice of the award, and had received a copy of the same.

Shepherd and *Bayley* Serjts. shewed cause, and insisted that where a verdict is taken at *Nisi Prius*, subject to the award of an arbitrator, the functions of the jury are thereby vested in the arbitrator; and when he has ascertained the sum due, the verdict may be altered accordingly, and the judgment entered thereon, without any other interference of the Court than that of making the rule of reference a rule of court; in support of this proposition they referred to *Grimes* v. *Naish*, *ante*, vol. 1. p. 480, and *Lee* v. *Lingard*, 1 *East* 401. (*a*) They observed that if it were otherwise, a Plaintiff consenting to a reference, and taking a verdict for his security,

(*a*) But see *Kettle* v. *Grove*, *Barnes*, 57. where the Court approved a contrary practice, saying "Plaintiff had not a right to enter judgment without leave of the Court."

 would

would be in a worse condition than if he abided the decision of the jury; whereas the object of taking a verdict was to place him in the same condition as if he obtained a verdict. With respect to the 2d objection, they contended that personal service was only necessary in order to bring a party into contempt, whereas the proceedings against the Defendant were not of that nature, but mere civil process founded on the judgment obtained by the Plaintiff.

Best Serjt. *contrà*, admitted that the cases of *Grimes* v. *Naish*, and *Lee* v. *Lingard*, were an answer to the 1st part of his 1st objection, but insisted that according to the words of the 9 & 10 *W.* 3. *c.* 15. *s.* 2. "any arbitration or umpirage made under a rule of reference might be set aside by the Court upon application made within the term immediately following the publication of the award," and consequently the Plaintiff had no right to enter up his judgment and proceed to execution till the expiration of the term, as the Defendant would thereby be precluded from applying to the Court to set aside the award. He also referred to *Read* v. *Garnett*, *Barnes* 58. to shew that where a Plaintiff takes a verdict for security, and refers the cause at *Nisi Prius*, the Court of Common Pleas had held that an affidavit of the due execution of the award, and of a demand of the money, is as necessary where the application is to have the *postea* delivered to the Plaintiff, in order that he may take out execution, as where the application is for an attachment.

Lord ALVANLEY Ch. J. It appears to me that the present application to the Court is without any foundation in reason. By consent of the parties an arbitrator is at *Nisi Prius* substituted in the place of the jury, and when his award is made the verdict must of course be entered so as to correspond with that award. It is not pretended that the Defendant was not informed of the arbitrator having made his award; but it is contended that he ought to have had personal service previous to the execution. But that I conceive to be perfectly unnecessary as a foundation for civil process. The 9 & 10 *W.* 3. does not apply to such a case as this. If therefore the Defendant wished to impeach the verdict as founded on the award, he should have applied to the Court for that purpose within the four first days of term.

HEATH J. The 9 & 10 *W.* 3. has no operation in this case. With respect to the case cited from *Barnes*, that has been overruled by subsequent authorities and practice; indeed many of the cases reported in that book are not law.

ROOKE

1802.

BORROWDALE v. HITCHENER.

ROOKE J. There can be no doubt that the 9 & 10 *W.* 3. does not apply to an award made under a submission of this kind. The award of the arbitrator is the verdict of the jury, and if that is not satisfactory the party aggrieved should come to the court as in other new trials within the four days. The reason upon which the decision in *Read* v. *Garnett* is founded proves it to be a case of no authority; for a demand of the money is there said to be as necessary before execution is taken out, as it would be in moving for an attachment. Now the former is civil, the latter criminal process.

CHAMBRE J. The limitation of time reserved in 9 & 10 *W.* 3. is for the party to apply to the equity of the Court. But the present judgment and execution are founded on a verdict. Personal service is only necessary in cases of criminal process, and not in cases of civil process. Rule discharged with costs.

Nov. 26th.

COLLETT v. THOMPSON.

In an action of *assumpsit* for non-performance of a contract for the sale of a house, with counts to recover back the deposit, the plaintiff having in his first count alleged that the Defendant, who was to make a good title, had delivered an abstract which was "insufficient, "defective, "and objec"tionable," the Court obliged the Plaintiff to give a particular of all objections to the abstract arising upon matters of fact.

THIS was an action brought to recover damages for the breach of an agreement for the sale of a house and a sum of money paid by way of deposit on the purchase of the premises. The 1st count was *in assumpsit* on the agreement to sell; and after alleging that the Defendant was to make a good title to the premises, stated in the breach that he delivered an abstract of title which was insufficient, defective, and objectionable, and that the premises were liable to incumbrances. There was also a count for money had and received.

A rule *Nisi* having been obtained on a former day, calling on the Plaintiff to shew cause why he should not deliver to the Defendant's attorney an account in writing of the insufficiencies, defects, and objections to the abstract delivered, and also of the incumbrances to which the premises were in the declaration alleged to be subject;

Shepherd Serjt. now shewed cause, and contended that the Court would not entertain this application, which was in the nature of a bill in equity, without any mutuality in the advantages to be derived under it, for that if the objections already within the Plaintiff's knowledge should be stated by way of particular, and previous to the trial it should be discovered that other objections existed, the

the Plaintiff would not be able to avail himself of them, but would be precluded by the particular. He observed that the abstract had been returned to the Defendant's attorney, with marginal notes pointing out as objections that two annuities, creating a charge upon the premises, had not been accounted for, and that an inspection of some deeds having been required, the Plaintiff had only been referred to a third person, in whose possession they were. The objections noted in the margin of the abstract were, he insisted, sufficient notice to the Defendant; and the application to a third person for the inspection of deeds, was not for the party purchasing, but the party selling, to make.

Best Serjt., *contrà*, observed that this, like other applications for particulars of a Plaintiff's demand, was only to prevent surprise, and was made necessary by the generality of the allegations in the Plaintiff's declaration; that it fell within the principles acted upon in the King's Bench, where in ejectments for re entry under breaches of covenant, the Plaintiff had been compelled to specify the breaches upon which he meant to rely (*a*), and that it was warranted by an opinion thrown out in this court some few terms back in a case of *M'Connell* v. *Hector*, where on an issue from the Court of Chancery to try a question of bankruptcy, and an application for a particular of the acts of trading meant to be relied on, the Court held it a reasonable application (*b*).

The Court were of opinion that the Plaintiff was not bound to state in his particular any of the objections in point of law arising upon the abstract delivered, but that he ought to specify every matter of fact which he meant to rely upon at the trial, as having been a cause of his not being able to complete the purchase. Accordingly with this qualification they made the

Rule absolute.

(*a*) *Doe d. Birch* v. *Phillips*, 6 *T. R.* 597.

(*b*) *Note*; This intimation was thrown out in that case on the rule *Nisi*, which was afterwards abandoned.

WENNALL *v.* ADNEY.

Nov. 26th.

A master is not liable upon an implied *assumpsit* to pay for medical attendance on a servant who has met with an accident in his service

ASSUMPSIT to recover the amount of a surgeon's bill.

The cause was tried before *Le Blanc* J. at the last *Shrewsbury* assizes, when it appeared that the action was brought to recover

1802.

WENNALL v. ADNEY.

8 *l.* 18 *s.* 6 *d.* the amount of a bill for medical attendance upon a servant of the Defendant, who had his arm broken while driving the Defendant's team, and who had been hired by the Defendant at the yearly wages of 3 *l.* 10 *s.* and victuals; that the accident happened nearer the house of the servant's mother than that of the Defendant, and that he was taken to his mother's house; that the accident happened in one parish, that the house of the servant's mother was situated in another, and the Defendant's in a third; that the Plaintiff, who was the surgeon usually employed by the Defendant, accidentally passing near the mother's house, was called in and desired to attend her son; at which time nothing was said about the Defendant paying for his attendance, but the mother observed that she had always been able to pay her way, and hoped she should do so still; that during the time of the servant's confinement he was supplied with victuals from the Defendant's house; that the Plaintiff first delivered his bill to the Defendant, but afterwards called a meeting of the parishioners of the parish in which the mother's house was situated, and submitted it to them for payment, who refused to discharge it. The learned Judge being of opinion that the Defendant, not having employed the Plaintiff, or made any promise of payment, was not liable, nonsuited the Plaintiff.

A rule *Nisi* having been obtained for setting aside this nonsuit,

Bayley Serjt. shewed cause. The Defendant in this case having entered into no express contract with the Plaintiff for the cure of the servant, the question will be, Whether a master be so far bound to pay for medical assistance if his servant meet with an accident in his service, that the law will imply a contract so as to charge him? It is true that in the case of *Scarman* v. *Castell*, 1 *Esp. N. P. Cas.* 270. Lord *Kenyon* held that an apothecary might recover from a master the amount of a bill for medicine and attendance furnished to and bestowed upon his servant; but it may be observed, although it does not appear in the report, that the apothecary in that case attended the servant in the house of the Defendant, who was a man of large fortune, and though not expressly employed by the Defendant, he might infer from the circumstance of his being sent for to the Defendant's house that he was to be paid by the Defendant. In *Newby* v. *Wiltshire*, which is printed in 2 *Esp. N P.* 739. Lord *Mansfield* says, "I think in general a master ought to maintain his servants and take care of them in sickness;

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but the question now is, What is the law?" There the action was brought by the overseer of the parish against the Defendant for money laid out in the cure of a servant of the Defendant, who had met with an accident in the Defendant's service, and it was held that the Plaintiff was not entitled to recover. There is also a case of *Simmons* v. *Wilmot*, 3 *Esp. N. P. Cas.* 91. in which Lord *Eldon* held that the Plaintiff, who had taken into his house and paid for the cure of the servant of a third person, might recover against the officers of the parish were the accident happened, the master not having resided in that parish, and the parish officers being liable to provide for casual poor.

Williams Serjt. in support of the rule. In *Simmons* v. *Wilmot*, Lord *Eldon* recognizes the doctrine laid down by Lord *Kenyon* in *Scarman* v. *Castell*, and though the parish officers in that case were held liable, yet a distinction was taken between weekly servants and those hired for a longer period, the servant in that case being of the former description. The decision in *Scarman* v. *Castell* was acquiesced in, though the Defendant was well able to apply to the Court for a revision of that opinion had it been thought not to be maintainable. In *Dalton's Justice*, *c.* 58. p. 141. edit. 1742, it is said, "If a servant, retained for a year, happen within the time of his service to fall sick, or to be hurt or lamed, or otherwise to become *non potens in corpore* by the act of God, or in doing his master's business; yet the master must not therefore put such servant away, nor abate any part of his wages for such time." The rule laid down by *Dalton* must extend to oblige the master to provide medical assistance; for it would be of little advantage to the servant to remain sick in his master's house unless he were properly attended there and supplied with medicine. It is not necessary that the mistress in this case should have made an express promise, for if she were liable there was no need of a promise to bind her; and if she were not liable, the promise would be *nudum pactum* (*a*).

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(*a*) An idea has prevailed of late years that an *express* promise, founded simply on an antecedent moral obligation, is sufficient to support an *assumpsit*. It may be worth consideration, however, whether this proposition be not rather inaccurate, and whether that inaccuracy has not in a great measure arisen from some expressions of Lord *Mansfield* and Mr. Justice *Buller*, which, if construed with the qualifications fairly belonging to them, do not warrant the conclusion which appears to have been rather hastily drawn from thence. In *Atkins* v. *Hill*, *Cowp.* 288., which was *assumpsit* against an executor on a promise by him to pay a legacy in consideration of assets, Lord *Mansfield* said, "It is the case of a promise made upon a good and valuable consideration

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1802.
WENNALL v. ADNEY.

This appears from *Watson* v. *Turner*, *Bull. N. P.* 147. where the overseers of the poor were held liable to an apothecary for his attendance,

which in all cases is a sufficient ground to support an action. It is so in cases of obligations which would otherwise only bind a man's conscience, and which without such promise he could not be compelled to pay." And in *Hawkes* v. *Sanders*, *Cowp.* 290. which was a similar case with *Atkins* v. *Hill*, Lord *Mansfield* said that the rule laid down at the bar, "that to make a consideration to support an *assumpsit* there must be either an immediate benefit to the party promising or a loss to the person to whom the promise was made," was too narrow; and observed, "that a legal or equitable duty is a sufficient consideration for an actual promise; that where a man is under a moral obligation, which no Court of law or equity can enforce, and *promises*, the honesty and rectitude of the thing is a consideration." His Lordship then instanced the several cases of a promise to pay a debt barred by the statute of limitations, a promise by a bankrupt after his certificate to pay an antecedent debt, and a promise by a person of full age to pay a debt contracted during his infancy. The opinion of Mr. Justice *Buller* in the last case was to the same effect, and the same law was again laid down by Lord *Mansfield* in *Trueman* v. *Fenton*, *Cowp.* 544. Of the two former cases it may be observed, that the particular point decided in them has been over-ruled by the subsequent case of *Deeks* v. *Strutt*, 5 *T. R.* 690. And it may further be observed, that however general the expressions used by Lord *Mansfield* may at first sight appear, yet the instances adduced by him as illustrative of the rule of law, do not carry that rule beyond what the older authorities seem to recognize as its proper limits; for in each instance the party bound by the promise had received a benefit previous to the promise. Indeed it seems that in such instances alone as those selected by Ld. *Mansfield* will an *express* promise have any operation, and there it only becomes necessary, because though the consideration was originally beneficial to the party promising, yet, inasmuch as he was not of a capacity to bind himself when he received the benefit, or is protected from liability by some statute provision, or some stubborn rule of law, the law will not as in ordinary cases *imply* an *assumpsit* against him. The same observation is applicable to *Trueman* v. *Fenton*, that being an action against a bankrupt on a promise made by him subsequent to his certificate respecting a debt due before the certificate. There is however rather a loose note of a case of *Scott* v. *Nelson*, *Westminster* Sittings 4 *Geo.* 3. cor. Ld. *Mansfield* (see *Esp. N. P.* 945.), in which his Lordship is said to have held a father bound by his promise to pay for the previous maintenance of a bastard child. And there is also an anonymous case, 2 *Show.* 184., where Lord Ch. J. *Pemberton* ruled that "for meat and drink for a bastard child an *indebitatus assumpsit* will lie." Although the latter case does not expressly say that there was a previous request by the Defendant, yet that seems to have been the fact, for Ld. *Hale's* opinion is cited to shew "that where there is common charity and a charge," the action will lie; which seems to imply that if a charge be imposed upon one person by the charitable conduct of another, the latter shall pay; and though he adds "and undoubtedly a special promise would reach it," that expression does not necessarily import a promise subsequent to the charge being sustained, but may be supposed to mean that where a party is induced to undertake a charge by the engagement of another to pay, the latter will certainly be liable even though he should not be so where the charge was only induced by his conduct without such engagement. The case of *Watson* v. *Turner*, *Bull. N. P.* 147. has sometimes been cited in support of what has been supposed to be the general principle laid down by Lord *Mansfield*, because in that case overseers were held bound by a mere subsequent promise to pay an apothecary's bill for care taken of a pauper; but it may be observed, that "this was adjudged not to be *nudum pactum*, for the overseers are bound to provide for the poor;" which obligation being a legal obligation distinguishes the case. Indeed in a late case of *Atkins* v. *Banwell*, 2 *East.* 505. that distinction does not seem to have been sufficiently adverted to, for *Watson* v. *Turner*

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tendance, though not ordered by them, and a subsequent promise by them to pay was said not to be *nudum pactum*, because they were bound by law to provide for the poor. 1802. WENNALL v. ADNEY.

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was cited to shew that a mere moral obligation is sufficient to *raise* an implied *assumpsit*, and though the Court denied that proposition, yet Lord *Ellenborough* observed that the promise given in the case of *Watson* v. *Turner* made all the difference between the two cases, without alluding to another distinction which might have been taken, viz. that though the parish officers were bound by law in *Watson* v. *Turner*, the Defendants in the principal case were not so bound, because the pauper had been relieved by the Plaintiffs as overseers of another parish, though belonging to the parish of which the Defendants were overseers. In the older cases no mention is made of moral obligation; but it seems to have been much doubted whether mere natural affection was a sufficient consideration to support an *assumpsit*, though coupled with a subsequent express promise. Indeed Lord *Mansfield* appears to have used the term *moral obligation* not as expressive of any vague and undefined claim arising from nearness of relationship, but of those imperative duties which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability. On such duties, so exempted, an express promise operates to revive the liability and take away the exemption, because if it were not for the exemption they would be enforced at law through the medium of an implied promise. In several of the cases it is laid down, that to support an *assumpsit* the party promising must derive a benefit, or the party performing sustain an inconvenience occasioned by the Plaintiff; *per Coke* and all the Justices, *Hatch* and *Capel's* case, *Godb.* 203. *per Reeve* J. *Mar.* 203. *per Coke* Ch. J. and *Dodderidge* J. 3 *Bulst.* 162. and *per Coke* Ch. J. *Roll. Rep.* 61. *pl.* 4. And in *Lampleigh* v. *Brathwaite*, *Hob.* 105. it was resolved "that a mere voluntary curtesy will not have a consideration to uphold an *assumpsit*. But if that curtesy were moved by a suit or request of the party that gives the *assumpsit*, it will bind; for the promise, though it follows, is not naked, and couples itself with the suit before, and the merits of the party procured by that suit." And in *Bret* v. *J. S. and his Wife*, *Cro. Eliz.* 755. where the first husband of the wife sent his son to table with the Plaintiff for three years at 8*l. per ann.* and died within the year, and the wife during her widowhood, in consideration that the son should continue the residue of the time, promised to pay the Plaintiff 6*l.* 13*s.* 4*d.* for the time past, and 8*l.* for every year after, and upon which promise the Plaintiff brought his action; the Court held that natural affection was not of itself a sufficient ground for an *assumpsit*; for although it was sufficient to raise an use, yet it was not sufficient to ground an action without an express *quid pro quo*; but that as the promise was not only in consideration of affection, but that the son should afterwards continue at the Plaintiff's table, it was sufficient to support a promise. In *Harford* v. *Gardiner*, 2 *Leo.* 30. it was said by the Court, that love and friendship are not considerations to found actions upon, and in *Best* v. *Jolly*, 1 *Sid.* 38. where a father was held liable for his own and his son's debt, because he had promised to pay them if the Plaintiff would forbear to sue for them, yet the Court said, "he was not liable for his son's debt," but having induced forbearance, which is a damage to the Plaintiff, he was held liable, "though as to the son's debt it was no benefit to the Defendant." So in *Beesich* v. *Coggil*, *Palm.* 559. it was debated whether the Defendant was liable upon an express promise to repay the Plaintiff money laid out by him in *Spain* for the Defendant's son, and the charges of his funeral, *Hyde* Ch. J. and *Whitelock* being of opinion that the action could not be maintained; *Jones* and *Dodderidge* è *contrà* that it could. The former of which it should seem was the better opinion; for in *Butcher* v. *Andrews*, *Carth.* 446. on *assumpsit* for money lent by

1802.
WENNALL v. ADNEY.

Lord ALVANLEY Ch. J. I have reason to believe that the opinion delivered by Lord *Kenyon* in the case of *Scarman* v. *Castell*, was not a hasty opinion, but formed upon reflection. I have no difficulty,

by the Plaintiff to the Defendant's son at hi instance and request, and verdict for the Plaintiff, the judgment was arrested, *Hale* Ch. J. saying, " if it had been an *indebitatus* for so much money paid by the Plaintiff at the request of the Defendant unto his son, it might have been good, for then it would be the father's debt and not the son's; but when the money is lent to the son, it is his proper debt, and not the father's." But in *Church* v. *Church*, *B. R.* 1656, cit. Sir *T. Ray*. 260. where Defendant promised to repay the Plaintiff the charges of his son's funeral, the latter was held entitled to recover, though no request was laid in the declaration. Of which case it may be observed, that possibly after verdict the Court presumed a request proved; for in *Hayes* v. *Warren*, 2 *Str*. 933. though the Court would not presume a request after judgment by default, yet they said they would have presumed it after verdict. However, in *Style* v. *Smith*, cited by *Popham* J. 2 *Leon*. 111. it was determined that if a physician in the absence of a father give his son medicine, and the father in consideration thereof promise to pay him, an action will lie for the money. But the case of *Style* v. *Smith*, if closely examined, will not perhaps be found so discordant with the principle laid down in *Bret* v. *J. S. and his Wife* as may be supposed. From the expression " in the absence of a father," used in that case, it may be inferred that the son lived with the father, and that the medicine was administered to the son in the house of the father, while the latter was absent, from whence it results that the physician's debt, though not founded on any immediate benefit to the father, or on his request, was most probably founded on his credit; which credit, if fairly inferred from circumstances by the physician, might operate to charge the father in the same way as his request would operate, the physician having sustained a loss in consequence of that credit. Indeed if any of the cases could be sustained on the principle that a father is, by the mere force of moral obligation, bound to pay what has been advanced for his son, because he has subsequently promised to pay it; by the same rule the son should be liable for the debt of the father upon a similar promise; for the same moral obligation exists in both cases. Yet in *Barber* v. *Fox*, 2 *Saund*. 136. the Court arrested the judgment in an action of *assumpsit* on a promise made by the Defendant, to avoid being sued on a bond of his father, it not being alleged that the Defendant's father had bound himself and his heirs; for they refused to intend even after verdict that the bond was in the usual form, and consequently held the promise of the Defendant *nudum pactum*, he not appearing to have been liable to be sued upon the bond. And this last case was confirmed in *Hunt* v. *Swain*, 1 *Lev*. 165. Sir *T. Ray*. 127. 1 *Sid*. 248. See note 2 to *Barber* v. *Fox*, by Mr. Serjt. *Williams*. Indeed it is clear from *Lloyd* v. *Lee*, 1 *Str*. 94. and *Cockshott* v. *Bennett*, 2 *T. R*. 763. that if a contract between two persons be *void*, and not merely *voidable*, no subsequent express promise will operate to charge the party promising, even though he has derived a benefit from the contract. Yet according to the commonly received notion respecting moral obligations and the force attributed to a subsequent *express* promise, such a person ought to pay. An express promise, therefore, as it should seem, can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original right of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision. In addition to the cases already collected upon this subject, it may be observed, that in *Mitchinson* v. *Hewson*, 7 *T. R*. 348. the Court of King's Bench, upon the authority of *Drue* v. *Thorn*, *All*. 72. held a husband not liable to be sued alone

difficulty, however, in saying, that I concur with the learned Judge before whom this cause was tried in thinking that the Defendant is not liable. The sum in dispute is only 8 *l.* 18 *s.* 6 *d.*, and if a wish is entertained by those whom this judgment may affect to obtain a more solemn decision upon this point, some opportunity should be taken where a greater stake is in litigation. In this kind of question much may depend upon the nature of the contract entered into between the master and the servant. Sometimes a master engages to supply his servant with necessary victuals, and it may undoubtedly be argued, that necessary victuals mean such victuals as may suit the state of health or infirmity in which the servant happens to be; as if a servant be in need of wine or victuals of that description, which are given by way of medicine. It is sufficient, however, to observe, that previous to the case of *Scarman* v. *Castell*, there is no authority in the law of *England* to be found which warrants the position contended for on the part of the Plaintiff. I have no doubt whatever that parish officers are bound to assist where such accidents as these take place; and that the law will so far raise an implied contract against them as to enable any person who affords that immediate assistance which the necessity of the case usually requires, to recover against them the amount of money expended.

1802.

WENNALL v. ADNEY.

HEATH J. I believe that the humanity of Lord *Kenyon* misled him when he adopted the doctrine upon which he decided the case of *Scarman* v. *Castell.* Probably at the moment it occurred to him that if the master was not bound to provide medical assistance for his servant, the latter would be left wholly destitute: but I am perfectly sure it is more for the advantage of servants that the legal claim for such assistance should be against the parish officers rather than against their masters; for the situation of many masters who are obliged to keep servants, is not such as to enable them to afford sufficient assistance in cases of serious illness.

ROOKE J. The contract on the part of the servant is merely to serve; but on the part of the master it is varied by numberless stipulations, according to the inclinations of the contracting parties. I

alone for the debt of his wife, contracted before marriage, though the objection was only taken in arrest of judgment, and consequently a promise by him to pay the debt appeared upon the record. From whence this principle may be extracted, that an obligation to pay in one right, even though it be a legal obligation, and coupled with an express promise, will not support an *assumpsit* to pay in another right.

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1802.
WENNALL v. ADNEY.

cannot think, however, that without any ſtipulation to that effect, the maſter is liable to furniſh his ſervant with medicine; and indeed the paſſage from *Dalton* ſeems to point out the utmoſt extent of inconvenience to which the maſter is obliged to ſubmit in caſe of his ſervant's illneſs. If the general principle contended for by the Plaintiff were to be adopted as a rule of law, many perſons who are obliged, for the purpoſes of their trade, to keep a number of ſervants, would be unable to fulfil the duty impoſed upon them by the law. It muſt be left to the humanity of every maſter to decide whether he will aſſiſt his ſervant according to his capacity or not.

CHAMBRE J. The obligation of the maſter to provide medical aſſiſtance for his ſervant, if any, muſt ariſe from contract. It cannot be contended that a maſter impliedly contracts to furniſh his ſervant with all neceſſaries; for in ſome caſes he neither engages to furniſh cloaths nor victuals; and if not, he is not bound to provide either. What has paſſed at *Niſi Prius* upon this ſubject has been ſomewhat haſty; and I think the rule there laid down would be very diſadvantageous to the ſervants themſelves if it were adopted. The paſſage from *Dalton* does not appear to me to extend the legal obligation of the maſter in the way contended for; and except that paſſage there ſeems to be nothing but the modern *Niſi Prius* authorities from which any inference can be drawn in the Plaintiff's favour.

Rule diſcharged.

Nov. 26th.

If three partners (two of whom reſide abroad and one in *England*) be ſued for a partnerſhip debt, and the partner reſident in *England* appear to the action, but refuſe to appear for the partners reſident abroad, the ſheriff, under a *diſtringas* againſt the two partners, may take partnerſhip effects, tho' paid for by the partner reſident in *England* alone, to whom the partnerſhip was largely indebted: and the Court will not relieve him againſt ſuch diſtreſs.

MORLEY and Another, Aſſignees of PISTOR a Bankrupt, v. STROMBOM, HUDSON, and LOWRIE.

THIS was an application to the Court on the part of *Hudſon*, one of the Defendants, calling on the Plaintiffs to ſhew cauſe why the iſſues levied under a *diſtringas* againſt *Strombom* and *Lowrie*, the other two Defendants, ſhould not be returned to him, and in the mean time all proceedings be ſtayed.

The Defendants *Strombom* and *Lowrie* (who were reſident at the *Cape of Good Hope*), together with *Hudſon* the other Defendant, who was reſident in *London*, carried on buſineſs in *London* under the firm of *Strombom*, *Hudſon*, and *Lowrie*. *Strombom* and *Lowrie* drew a bill upon their houſe in *London* in favour of the

bankrupt

bankrupt *Pistor*, which was accepted by *Hudson* in the name of the firm. The Plaintiff having brought an action upon this bill against the three Defendants, *Hudson* entered an appearance for himself, but declined to appear for the other Defendants, alleging he had no authority so to do; the partnership had no goods in this country except a desk and the furniture of a counting-house, which had been paid for by *Hudson*, to whom the partnership was largely indebted. A writ of *distringas* having issued against *Strombom* and *Lowrie* for their non-appearance, and the sheriffs being about to take away the desk and furniture of the counting-house, *Hudson* paid the value of them to avoid that inconvenience: but afterwards entered an appearance for the other Defendants, protesting at the same time against the irregularity of the sheriff's proceedings; upon which the money was restored to him under a judge's order. The Plaintiffs then proceeded to final judgment, and commenced an action on that judgment against the three Defendants, to which *Hudson* appeared, but declined appearing for the other Defendants; upon which another *distringas* issued, and the desk and furniture of the counting-house were again taken, and *Hudson* again paid the money, at the same time giving notice to the sheriff to retain it in his hands.

Bayley Serjt. was proceeding to shew cause, when *Shepherd* Serjt. was called upon to support his rule. He contended that under the *distringas* the sheriff was not entitled to take any goods but those in which *Strombom* and *Lowrie* had an interest, whereas they had no interest in the goods which had been seized under the *distringas*, inasmuch as they were paid for by *Hudson*, who was a creditor of the other two partners; that even under an execution against one of several partners, where the sheriff seizes partnership goods he can only retain the undivided interest, *Heydon* v. *Heydon*, 1 *Salk*. 392.; and in such a case the Court of King's Bench have directed the Master to take an account of the share of the partnership effects to which the other partners were entitled, *Eddie* v. *Davidson*, *Doug*. 650. That if any doubt could be entertained with respect to the power of the Court to interfere in a case of execution, there could be none in the case of a *distringas*, it being the daily practice of the Court to order issues to be restored where they have been improperly taken; that if the Plaintiff had applied to the Court for leave to sell the issues he could not have been permitted so to do if the Court had been aware of the circum-

1802. ſtances of the caſe, and that what the Plaintiffs ought not to be permitted to ſell, they ought to be compelled to reſtore.

HOPLEY v. STROMBOM and Others.

Lord ALVANLEY Ch. J. In this caſe, three perſons being in partnerſhip, one accepts a bill in the name of himſelf and the two others, upon which a joint action is brought againſt him and the two others in whoſe name and by whoſe authority he has accepted the bill. To this action the two partners not reſident in *England* having neglected to appear, the Plaintiff ſeeks to compel an appearance; the only two methods in which this can be done are by diſtraining on their property in *England*, if any can be found, which is the more ſpeedy proceſs, or by proceeding to outlawry, if no property can be found, which is the more circuitous proceſs. The Court will certainly be diſpoſed to favour the former. The ſheriff, being directed to take into his cuſtody the property of theſe two partners, ſeizes certain goods in the counting-houſe, which the third partner admits to be partnerſhip property, but alleges that if an account were taken between him and his other two partners, it would be found that they were indebted to him. Though he would be ultimately bound to pay the whole bill himſelf upon an execution, yet he inſiſts that this property ought not to be taken to compel an appearance of the other two partners, and that the Plaintiffs are bound to proceed to outlawry. It is admitted that whatever may be taken in execution may be taken under a diſtreſs; and if the abſent Defendants had any intereſt in this property, it is liable both to execution and diſtreſs. If they had no intereſt, the ſheriff ought to have ſaid ſo by returning *nulla bona*. There is no ground in law, therefore, for objecting to this proceeding; and in point of diſcretion I ſee no reaſon why the Court ſhould interfere as a matter of favour in order to drive the Plaintiffs to an outlawry.

ROOKE (*a*) J. I am of the ſame opinion. The Plaintiff has a claim againſt the partnerſhip, and *Hudſon* has a claim againſt the partnerſhip alſo; does the claim of the latter afford any ground for ſaying that the former ſhould not have the benefit of his claim againſt the partnerſhip aſſets?

CHAMBRE J. No queſtion is made with reſpect to the ſtrict point of law. Admitting that the Court may interfere more in the caſe of a diſtreſs than an execution, yet their interference muſt

(*a*) Mr. Juſtice *Heath* was abſent.

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be regulated by a due regard to the equity and policy of the case. What may be taken under an execution may be taken under a distress. Why should we interfere in the latter case to prevent the Plaintiffs from recovering a just debt? This Defendant is at any rate liable to answer the full extent of the Plaintiffs' demand; and after all the delay of an outlawry, execution may be sued out against him to that amount. The law is with the Plaintiffs, and no reason appears for the exercise of our discretionary power in favour of the Defendant.

1802. MORLEY v. STROMBOM and Others.

Rule discharged with Costs.

Lord NELSON v. TUCKER.

Nov. 26th.

If an Admiral, commander in chief upon a station, come home by leave of the Admiralty for the re-establishment of his health, leaving the squadron under the command of the flag-officer next in seniority, but retain his commission as commander in chief, *Quære* whether he be entitled to share in prizes taken by the cruisers of the squadron during his absence?

THE question in this case arose upon a special verdict found at the *Guildhall* Sessions before Lord *Alvanley* Ch. J., and was twice argued in this court; 1*st*, by *Bayley* Serjt. for the Plaintiff, and *Best* Serjt. for the Defendant; and 2*dly*, by *Lens* Serjt. for the Plaintiff, and *Vaughan* Serjt. for the Defendant. The substance of the special verdict is so fully stated by Mr. Justice *Chambre*, in his judgment, that it has been thought unnecessary to introduce it at length, and the arguments are omitted because the case was so fully spoken to by the learned Judges.

After the second argument in *Trinity* term last, the case stood over for the opinion of the Court, and on this day the learned Judges delivered their opinions *seriatim*, there being a difference among them.

CHAMBRE J. This case comes before the Court upon a special verdict in an action for money had and received, money paid and expended, and on an account stated; to which the Defendant pleaded the general issue.

The substance of the special verdict is, that, on the 2d of *October* 1795, the Lords of the Admiralty appointed Earl *St. Vincent* (then Sir *John Jervis*, admiral of the blue,) commander in chief of his Majesty's ships and vessels employed, and to be employed in the *Mediterranean*; requiring him forthwith to take upon himself the charge and command of the said ships and vessels as commander in chief; and charged the captains, officers, and companies belonging to the ships, to obey him as such; and that Lord *St. Vincent* should follow the orders and directions he should from time to time receive

 from

1802.
Ld. Nelson
v.
Tucker.

from the Lords of the Admiralty, or any other his superior officers. The verdict then states Lord *St. Vincent*'s arrival at the station, and taking upon him the command; the limits of which did not at first extend beyond the straits of *Gibraltar*, but under an order of the Admiralty, dated the 7th of *November* 1796, they were extended along the coast of *Spain* and *Portugal*, as far to the northward as *Cape Finisterre*; and continued so extended till after the time when the capture, which forms the subject of the present question, was made. In consequence of an application from Lord *St. Vincent*, the Lords of the Admiralty, by letter dated the 2d of *November* 1798, gave him permission to return to *England* for the re-establishment of his health, on his leaving the command of the fleet in the charge of the officer next to him in seniority, with such instructions for such officer's guidance as he might judge necessary, if he should find, on the receipt of that letter, that the state of his health should absolutely require it. Lord *St. Vincent*, after he had received that letter, wrote to decline availing himself of the indulgence till he should be compelled to relinquish the command by a return of his complaint; and on the 11th of *March* 1799, he gave a written order to Captain *Digby*, of the *Alcmene*, being under his command as such commander in chief, to cruize off the north-west coast of *Spain*, so long as his water and provisions should last, for the protection of the trade of his Majesty's subjects and his allies; and when he found it necessary to go into port to re-victual, to repair to *Lisbon*, and return with the utmost dispatch to the station, and act as before directed till he had further orders. The station thus appointed for Captain *Digby*'s cruize is found to be within the limits of Lord *St. Vincent*'s command. On the 16th of *June* 1799, Lord *St. Vincent* gave an order to Vice-Admiral Lord *Keith*, the officer next to him in seniority, in which, after stating the permission obtained for his own return, he directs Lord *Keith* to take the command as follows: "Desirous as I am of giving all possible effect and energy to his Majesty's service at a crisis which admits of no impediment, but, on the contrary, demands the fullest exercise of an efficient and uncontrolled authority, I have resolved, on maturely considering these important objects, and on contemplating your Lordship's zeal and persevering efforts in the attainment of them, to avail myself of the permission thus provisionally granted, and to leave his Majesty's fleet serving upon this station under your command. Your Lordship is therefore hereby required

and

and directed to take the several flag-officers and captains of the said fleet under your command accordingly." Notwithstanding the last order, Lord *St. Vincent* remained on the station in the full and actual exercise of all the powers and authorities of commander in chief till the 31st day of *July* 1799; when under the permission he had so obtained, he sailed from *Gibraltar* in the *Argo*, for *England*; and on the 16th of *August*, before the taking of the prize hereafter mentioned, he arrived at *Spithead*. By permission of the Admiralty, he went to *Bath*, for the benefit of his health; and continued in *England* till the 26th of *November* 1799, without having resigned or being superseded or removed from his office of commander in chief; and during all that time, as such commander in chief, he was continued and borne upon the *Argo*'s books. On the 29th of *July* 1799, Lord *Keith*, under the orders of Lord *St. Vincent*, who was then remaining at *Gibraltar*, passed the straits with Admiral Sir *William Parker*, the officer next to him in seniority, and a detachment of the *Mediterranean* fleet, in pursuit of the combined fleets of the enemy; and on or about the 10th of *August* 1799, passed *Cape Finisterre*, the northernmost limit of the station. Having chased the enemy into *Brest*, Lord *Keith*, with his squadron, in pursuance of an order from the Lords of the Admiralty, dated the 16th of *August*, proceeded to *Torbay*; and on the 19th of *August*, put himself under the command of Lord *Bridport*, the commander in chief of the *Channel* fleet. After Lord *St. Vincent*, Lord *Keith*, and Sir *William Parker*, had thus quitted the *Mediterranean* station, Lord *Nelson* became, and till after the capture of the prizes, continued the senior admiral personally serving within the limits of the *Mediterranean* station. By a letter dated the 20th of *August* 1799, the admiralty sent orders to Lord *Nelson*, informing him, that, from the circumstance of Lord *St. Vincent*'s return to *England*, and Lord *Keith*, with other flag officers, having quitted the *Mediterranean* in pursuit of the enemy, he was become the senior officer of his majesty's ships in the *Mediterranean*; and that till the return of Lord *Keith*, or some other superior officer, he would have all the important duties of that station to attend to; and after observing that it was probable that Lord *Keith* would have left for his lordship's information and guidance, such orders and instructions as he might have received either from the Admiralty or Lord *St. Vincent*, they proceed to point out the objects which require his particular attention, and give him directions re- 1802. Ld. Nelson v. Tucker.

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1802.

Ld. Nelson v. Tucker.

ſpecting his ſervices and the manner in which he is to employ the fleet. Lord *Nelſon* having become ſuch commander in chief, iſſued various orders to ſuch officers, commanders of ſquadrons and veſſels ſerving in the ſtation, as he fell in with. But he iſſued none to Captain *Digby*, whom he did not fall in with. The ſpecial verdict ſtates, *verbatim*, a great number of meſſages and orders, which, if they have any concern in the buſineſs, ought to have occupied a very few lines. Five of theſe documents are introduced on the part of the Defendant, eleven on the part of the Plaintiff. The whole of them ſeems to be the introduction of evidence of what there can be no doubt about, that Lord *St. Vincent* was conſidered by the Admiralty as retaining the office of commander in chief till his reſignation; and that after theſe junior admirals had left the ſtation, Lord *Nelſon* was conſidered as having the actual command of the ſtation, that all the orders and directions from the Admiralty were directed to him and not circuitouſly through the admiral in *England*. I will juſt mention the ſubſtance of each. The firſt is an order from the Admiralty, directed to Lord *St. Vincent*, dated the 15th of *October* 1799, deſiring him to order the captains and commanders under his command to alter the ſignal for the poſt-office packets. Againſt this there is an order of the ſame date and exactly of the ſame tenor, ſent to Lord *Nelſon*. The ſecond of theſe documents produced on the part of the Defendant is an appointment by Lord *St. Vincent*, dated the 16th of *October* 1799, of a flag lieutenant to his own ſhip the *Argo*, which had come home with him, and in which appointment he ſtiles himſelf commander in chief of the ſhips and veſſels on the *Mediterranean* ſtation. The third is dated the 20th of *Auguſt* 1799, and contains the Admiralty's approbation of his having granted leave of abſence to Mr. *Tucker*. The fourth is dated the 26th of *September* 1799, and acknowledges the receipt of Lord *St. Vincent*'s letter incloſing Captain *Digby*'s account of his capture of the *Courageux* privateer and two *Spaniſh* veſſels, and approves the captain's conduct; and the laſt, which is dated the 4th of *November* 1799, merely acknowledges the receipt of a letter with an incloſure, without ſaying of what nature. The documents on the part of the Plaintiff are, a direction to Lord *Nelſon* of the 1ſt of *September* 1799, for making a diſtribution of 4000*l.* among the crew of the *Ruſſian* ſhip which was to deliver up his Majeſty's ſhip the *Leander*; a direction of the 4th of *September*

1799.

1802.

LD. NELSON v. TUCKER.

1799, signifying the promotion of a lieutenant to the command of the *Perseus* bomb; a direction of the 30th of *September* 1799, to ratify a mistake which had been made as to the daily signals; a direction of the 15th of *October*, respecting the private signals of the post-office packets, the same as had been sent to Lord *St. Vincent*; another direction of the 16th of *October*, to suffer the *Portuguese* squadron serving under his orders to return to *Lisbon* for repairs; an acknowledgment of the 22d of *October*, of a letter from Lord *Nelson*, inclosing various accounts of proceedings, containing a strong approbation of Sir *Sidney Smith*'s conduct, and an answer to Lord *Nelson*'s letter as to a captain being advanced; another letter of the 23d of *October*, which contains a direction to permit the chaplain of the *Minotaur* to resign his appointment in order to come home to succeed to a living; another of the 13th of *December*, taking notice of a letter from Lord *Nelson*, stating that for certain reasons, he had given Captain *Trowbridge* an order to wear a broad pendant, under particular circumstances, and approving the same; another of the 14th of *December*, acknowledging the receipt of a letter of the 15th of *October*, with respect to the reduction of the island of *Malta*; another of the same date, saying that the Admiralty see no objection to the appointment of a commissary made by Lord *Nelson*; and, lastly, a letter from the Lords of the Admiralty, of the 22d of *February* 1800, to Lord *Nelson*, informing him that they had granted commissions to two persons recommended by him, but that they could not yet confirm the appointment of a third. This is the whole substance of this very long correspondence, stated in this special verdict. Then, these facts are stated. That on the 17th of *October* 1799, after Lord *St. Vincent*'s return to *England*, and while the Plaintiff was senior admiral personally serving on the station, Captain *Digby*, who had received no orders from the Plaintiff subsequent to those he had received from Lord *St. Vincent*, with his own ship, detached from Lord *Nelson*'s squadron, in company with some other *English* ships, captured two *Spanish* ships of war, which have been since condemned as prize to the *Alcmene* and other ships. Lord *Nelson* was not on board the *Alcmene* at the time of the capture. The Defendant, against whom the action is brought, is the principal prize agent for the flag officers, and the verdict states the sum he has in hand on account of the Plaintiff, or Lord *St. Vincent* as rightly may appear, to be 13,015 *l.* 4 *s.* The proclamation of the 25th of *January* 1797 is then set forth. But, as that is the

 instrument

instrument which we are called upon to expound and to apply the other facts to, I will first mention the few remaining facts stated in the special verdict; which are, That Lord *St. Vincent* resigned his commission as commander in chief in the *Mediterranean* long after these prizes were taken, on the 26th of *Nov.* 1799, up to which time he received pay and table money as such commander in chief. That Lord *Nelson*, after he had left the station, received the same pay as he had done before, but not the pay of a commander in chief. But that from the 12th of *August* he received the same table money as was allowed to Lord *St. Vincent*. These are the circumstances under which each of the real parties to the suit (for the Defendant is but a nominal one) claims to be entitled, by the proclamation of the 25th of *Jan.* 1797 and the prize act, to the share of Captain *Digby*'s prize, which belongs to the chief or senior flag officer under whose command Captain *Digby* was at the time of the capture. The form of this proclamation we are told has been used ever since the year 1756; when some alterations were made, though not very material ones, in the form that had been introduced in the year 1744. The material clauses in this proclamation of 1797, upon which the question depends, are these: The proclamation in the first place directs the net produce of all *Spanish* prizes to be divided into eight equal parts, of which the captain or captains of the ships actually on board at the time of taking of any prize are to have three-eighths. But this is qualified by a provision which is made for flag officers, if there shall happen to be any; and it is qualified in this way: "But in case any such prize shall be taken by any of his Majesty's ships of war under the command of a flag or flags, the flag officer or officers being actually on board or directing and assisting in the capture shall have one of the three-eighths, the said eighth part to be paid to such flag officer or officers in such proportion and subject to such regulations as are thereinafter mentioned." And then, it directs that the following regulations shall be observed concerning the one-eighth granted to the flag officer or officers: so that those regulations that follow relate to flag officers, and to flag officers only. The first of these is, "That a flag officer commander in chief, when there is but one flag officer upon service, shall have to his own use the said one-eighth part of the prizes taken by ships and vessels under his command." The second, "That a flag officer sent to command at *Jamaica* or elsewhere shall have no

right to any ſhare of prizes taken by ſhips or veſſels employed there before he arrives at the place to which he is ſent, and actually takes upon him the command." The third clauſe is, "That when an inferior flag officer is ſent out to reinforce a ſuperior, the ſuperior has no right to any ſhare of the prizes taken by the inferior before the inferior ſhall arrive within the limits of the command of the ſuperior, and actually receive ſome order from him." Then comes the fourth article, upon which the queſtion principally, and almoſt entirely depends, which is this; "A chief flag officer returning home from *Jamaica* or elſewhere ſhall have no ſhare of the prizes taken by the ſhips or veſſels left behind to act under another command." Then there are three other articles which relate merely to the proportions in which the one-eighth is to be divided when there are more flag officers than one, which are not material to the preſent queſtion. The queſtion therefore ſeems to turn, almoſt entirely, upon the conſtruction of the fourth article; though, if there were any ambiguity in it, reſort might be had to the preceding articles, as more fully ſhewing the general view and intention of the proclamation. But where is the doubt or ambiguity in the language of this fourth article? Was not Lord *St. Vincent* "a chief flag officer returning home?" Of that there can be no doubt. And were not prizes taken "by veſſels left behind to act under another command?" And was not that command the command of Lord *Nelſon?* I really do not ſee how any caſe can more diſtinctly come within the letter of and plain intention of a regulation. It ſeems to me to be impoſſible to ſtate one. And thinking ſo, it ſtrikes my mind to be impoſſible to ſtate a caſe that is more plain, unleſs, like the brothers in *Swift*, in conſtruing their father's will, when we find it will not anſwer our purpoſe, we pin a codicil to it. Although I conſider the language of this proclamation as ſo exceedingly plain, ſtill I muſt admit, that it has been the ſubject of very copious and very elaborate arguments in the courts of juſtice, and eſpecially in the caſe of *Johnſtone* v. *Margetſon*, reported 1 *H. Bl.* 262. It has alſo been diſcuſſed in a more recent caſe, the caſe of the *St. Anne* in the Court of Admiralty, which is reported in Dr. *Robinſon's Reports*, 3 vol. fol. 60. This laſt caſe is preſſed upon us as a caſe in point for the Defendant. And, if it were ſo, a deciſion of higher authority cannot be ſtated. But that deciſion appears to me to have no application to the

1802.

Ld. Nelson v. Tucker.

the present question, and to turn upon a point that cannot arise here; for I think that it has been truly observed in the course of the argument, that the whole of the part of the proclamation now in question relates to flag officers only, and the apportioning their shares among themselves. But in the case of the *St. Anne* there was no flag officer left in command. The King's Advocate was stopped by the Court as soon as he noticed that decision. And Sir *William Scott* decided the case upon the single point, that the Admiral had not abdicated his command under the circumstances there stated, considering the question to turn solely upon the right of the admiral, there being no other flag officer that had any claim or any right to share in that one-eighth with the admiral. He therefore considered the admiral, under the circumstances of that case, not having abdicated the command, to be entitled under the general clause; and, under the circumstances of that case, not to be effected by the restraining proviso. In the former case, which is reported in *H. Bl.*, there is no decision at all upon the point now before the Court; nor is any opinion hinted by the Court upon it. The determination against the Plaintiffs proceeded there upon the ground of Commodore *Johnstone*, to whom they were executors, having no command at all at the time of the capture, because the Court considered his acceptance of an appointment to the command upon another station to be a virtual resignation of his former command. And, having no command at all, his representative could not be entitled to any share of the prize. The present question, therefore, stands perfectly clear of authority. Some arguments have been used arising from collateral circumstances in the case; and these are, That Captain *Digby* was acting under orders received from Lord *St. Vincent;* that he had received no particular order from Lord *Nelson* after Lord *St. Vincent* had quitted the station; and that as Lord *St. Vincent* was responsible for the orders he had given, he ought also to share in the emoluments. The last argument would go a great way indeed, as a military officer, I presume, continues responsible for his conduct at least as long as he continues a military officer in any capacity whatever. But the case of *Pigot* v. *White*, which has been referred to in the argument, and is reported in a note to the case of *Johnstone* v. *Margetson*, is a complete answer to these objections. I shall therefore return to the examination of the proclamation itself. For what purpose

were these different restrictions introduced? Manifestly with this view; that a bare authority under a commission should not entitle a flag officer to share unless he was upon the station at the time, and a partaker then in the actual labour and danger of the service. With this view the commander in chief, when going out, is also restrained from sharing in prize till he arrives upon the station, and actually takes upon him the command. The last part of this restriction explains what is meant by having or taking the command. In one sense, he takes the command when he accepts the commission. And before the issuing of this proclamation he would have been entitled to a share. In the same sense only, I conceive, has he the command when he is returning from the station without being actually superseded. But that is not what the proclamation means. It means actual service and exercise of the command at the station, in contradistinction to the authority arising merely from his commission. And, to be consistent, the fourth article, when it speaks of leaving the ships behind to act under another command, must, as I conceive, be understood in the same sense. How has the Admiralty, and how have the parties themselves understood what was meant by having the command? Lord *St. Vincent*, when he applies to the Admiralty, receives permission to come home, leaving the command of the fleet in the charge of the officer next to him. So say the Admiralty. Lord *St. Vincent*, in his answer, says, he would not avail himself of the indulgence, till he should be compelled to relinquish the Command. When Lord *St. Vincent* gives his orders to Lord *Keith*, it is to take the command. He says, that the situation in which he shall leave him demands the fullest exercise of an efficient and uncontroled authority. He says, that he is determined to leave his Majesty's fleet serving upon this station under Lord *Keith*'s command. "Your lordship is, therefore, hereby required and directed to take the several flag officers and captains of the fleet under your command accordingly." Again, when the Admiralty write to Lord *Nelson*, they tell him he was become the senior flag officer, and that he would have all the important duties of that station to attend to. It is said the fourth article, when it makes use of the expression "another command," means another separate, independent command under a particular commission. Now, if that be the meaning of the fourth article, I shall be very glad to know for what

purpose

1802.
Ld. Nelson v. Tucker.

purpose that article was introduced at all. It is an observation which arises in favour of the Plaintiff. And it seems to me to be an argument of very considerable weight. If another commission had issued appointing another person to the chief command, what pretence would the admiral, so superseded, have to any share in prizes upon his return home? It is impossible that he could when he had quitted the station and was upon his return home. This clause would be entirely nugatory: and, certainly, we ought so to consider this proclamation as to give effect to every thing that we find in it, and not so to construe it as to determine that any particular clause, much less so material a one as this, is totally unnecessary. But this Clause in the proclamation is no hasty composition. There was a similar one in the proclamation in the year 1744; and that, too, was introduced as an amendment of the former proclamation, which had issued in 1740. It was a studied amendment of that former proclamation. That new form of proclamation, which was introduced in 1744, was continued in the proclamation of 1756. It was again considered; and after that consideration it was again expressed in the terms in which we now find it. Now, let us see what are the amendments that are made by this proclamation in 1797, and how the article stood in the former proclamation of 1744. Thus far the article is the same, "That a chief flag officer returning home from *Jamaica* or elsewhere shall have no share of the prizes taken by the ships or vessels." In the former proclamation, instead of the words "left behind to act under another command," it stood simply thus: "taken by the ships or vessels after he has got out of the limits of his command." No question then could arise upon the nature of the commission which any flag officer whom he might leave behind with the ships had. Whether he had the command in chief, or whether he had not a commission as commander in chief, could make no difference at all; because, in that case the chief flag officer so returning home would be ousted of any share in the prize-money, whatever was the commission held by the next flag officer in seniority. The words now introduced are, "left behind to act under another command." There is not a word in this clause of any other commission being granted to any other person. And it seems to me, the words "under another command" must, from the subject-matter both of this and the preceding clauses, be considered,

1802. Ld. Nelson v. Tucker.

as a regulation between flag officers, and be underſtood to mean another command of a flag officer. But, perhaps, when the Council had it in contemplation to amend the proclamation, they might think they had expreſſed themſelves more explicitly by introducing theſe words, than ſaying generally, "after he has got out of the limits of his command he ſhall have no ſhare of the prizes taken by the ſhips or veſſels left behind to act under another command," referring merely to the actual ſervice of the fleet, and to the perſon who had the actual command and gave the orders upon the ſtation. The proclamation ought, as I conceive, if it is expreſſed in plain and intelligible language, to be conſtrued according to its plain and common ſenſe. And we ought not to have recourſe to wild conjecture or to extrinſic inquiries in order to put a different conſtruction upon it than that which the words of the proclamation itſelf fairly import. I think, too, that the conſtruction which I am inclined to put upon this proclamation is that which beſt anſwers the manifeſt purpoſes of the proclamation itſelf, and of the public ſervice: for the object was to give encouragement to thoſe who were actually engaged in the ſervice, and not to thoſe who were merely at the time of taking the prize nominal ſervants of the public in virtue of a commiſſion. Between the two noble admirals, who are contending for this prize, it would be very invidious to draw any ſort of compariſon. The merits of each of them are with the public ineſtimable. And it is with ſome reluctance that we muſt feel ourſelves under the neceſſity of deciding this caſe in ſuch a way that in giving to one of theſe noble admirals what he ſo richly deſerves, we are obliged to take it from the other: but we muſt act according to the neceſſity; we muſt give our judgment according to the opinion we really form upon the meaning and intention of this proclamation. The proclamation is not incumbered by technical terms. It has no reference to any ancient courſe of the ſervice. But the proviſions of it ariſe ſolely from the act, and from the proclamation itſelf. I need not therefore go more at large into the arguments which have been ſo fully diſcuſſed, both upon the preſent and upon the former occaſion, and in ſome degree touched upon likewiſe in the caſe in the Admiralty, though not ſo fully as in the argument of the preſent caſe and the preceding caſe of *Johnſtone* v. *Margetſon*, becauſe, in conſequence of the interruption of the King's Advocate, who was counſel for the then repreſentative of Admiral *Murray*, he did not go on with

 that

1802.

Ld. Nelson v. Tucker.

that part of his argument, which might have been applied to this caſe. Upon the whole, however, this matter has been ſo very fully and ſo very ably diſcuſſed on each of theſe occaſions, that, without ſaying any thing further upon it, I content myſelf with declaring, that I think it plain that Lord *St. Vincent* was "a chief flag officer returning home;" that "he left the fleet to act under another commander;" and that "commander" was Lord *Nelſon*. Under theſe circumſtances my opinion is that the Plaintiff upon this ſpecial verdict is entitled to recover.

Rooke J. This is a queſtion on the conſtruction of a royal proclamation, iſſued by virtue of a diſcretionary authority veſted in the Crown under the prize acts. By 33 *G.* 3. *c.* 66. the intereſt in captures is veſted in the officers and ſeamen, to be divided in ſuch proportions and after ſuch manner as his Majeſty hath, by his proclamation of the 17th *April* 1793, already ordered and directed, or ſhall think fit to order and direct by proclamation iſſued for thoſe purpoſes. The 35 *G.* 3. *c.* 121. extends theſe proviſions to captures from the *Dutch* and *Spaniards*. As this proclamation is matter of abſolute diſcretion in the Crown, as it may be varied whenever his Majeſty may think proper, and as the war which gave riſe to it is now at an end, I conſider this as a queſtion not of any great importance to the naval ſervice at large, but as a queſtion which ſolely affects the private claims of the two noble perſons who are the real parties to this cauſe. To veſt the ſole intereſt of naval prizes in the captors has been the wiſe policy of the legiſlature of this country for a long time paſt, and it has been intended as a gratuity and reward to thoſe whoſe ſervices occaſion the capture, and to thoſe who by a ſort of political preſumption may be conſidered as contributing to it. The proclamation on which this queſtion ariſes is in the ſame form as all thoſe which have been iſſued ſince the year 1756. I preſume it is in ſome degree founded on rules of naval policy, and has a reference to the terms and courſe of the naval ſervice, therefore I hold myſelf bound to conſtrue it, not by the dry rules which prevail in the conſtruction of legal pleadings, but according to that policy and the courſe of that ſervice which thoſe who adviſed his Majeſty ſeem to have had in view when the proclamation iſſued, and which the Lords of the Admiralty ſeem to have adopted ſince, as far as this can be collected from the ſpecial verdict. The proclamation orders that in caſe any prize be taken by any of his Majeſty's ſhips under the

command of a flag or flags, the flag officer or officers, being on board and directing and assisting in the capture, shall have one-eighth of the three-eighths given before to the captains, and the said one-eighth to be paid to such flag officers in such proportions, and subject to such regulations, as are thereinafter mentioned. 1. A flag officer commander in chief, when but one flag officer, shall have the one-eighth to his own use. 2. When sent to command at *Jamaica*, &c. a flag officer shall have no share of prizes taken by ships employed there, before he arrives at the place to which he is sent and actually takes upon him the command. 3. If an inferior flag officer be sent out to reinforce a superior, the superior shall have no share of prizes taken by the inferior before he shall arrive within the limits of the command of the superior, and shall actually receive some orders from him. 4. A chief flag officer returning home from *Jamaica*, &c. shall have no share of the prizes taken by the ships left behind to act under another command. 5. The 5th article is immaterial to this question. 6. When more flag officers than one serve together, the one-eighth of the prizes taken by any ships or vessels of the squadron shall be divided in the following proportions: If only two, the chief shall have two thirds; if more than two, the chief shall have only one half. This proclamation is not penned so clearly as it might have been. The fourth regulation, as to the flag officers returning home, is equivocal; it may respect all chief flag officers returning home under all circumstances; it may respect only such chief officers as return home and are relieved by others. The leaving ships behind to act under another command may mean to act under the absolute command of another, who is appointed to relieve or succeed the chief who returns home; or it may mean leaving ships to act under the command of the next senior flag officer who remains on the station, and who is to act temporarily and provisionally till the chief returns, or till a new commander in chief is appointed. To solve this doubt, and to enable me to decide which construction should prevail, I think it necessary to look through the whole proclamation, and also to see what cases have already been decided upon it, and what appears from the special verdict to be the course of the service. As to the proclamation, the captain who takes a prize, if he is under the command of a flag, is to let the flag officer have one eighth. These words "under the command of a flag" in this clause, and the words "under another command" in the fourth clause,

1802.
Ld. Nelson
v.
Tucker.

clause, may, I think, reasonably be construed to have a similar meaning: they are both in the same proclamation, and both *in pari materiâ*. What is meant by being under command in the one clause, should also be considered as meant by being under command in the other. Now it has been decided, in the case of the *St. Anne*, (and very rightly, as I think, according to the course of the service,) that when a flag officer leaves his station on account of health, and does not abdicate the command, the captain to whom he has at any time given orders is still under his command: for the same reason it appears to me that when a flag officer leaves his station on account of health, and leaves a junior flag officer to act in his absence, that junior is still under his command; and if he is, then the whole fleet is so; and if the whole fleet is still under his command, within the sense of the first clause, I think it is to be considered as under his command, and not under another command, within the sense of the fourth clause. It is probable, for I do not assert it as a known fact, that before the proclamation of 1744, flag officers returning home claimed a right to share in the prizes taken by the cruisers who had received orders from them, and had received none from the officer who relieved them. The proclamation of 1744 ordered that they should not share in the prizes taken after they got out of the limits of their command. But this being always disputable and uncertain, the proclamation of 1756 made the present regulation that they should share in no prizes taken after they had left the squadron to act under another command. This form has continued ever since, and I think it was intended to prevent disputes between flag officers, where one is going out to relieve, and the other is returning on being relieved, and was not intended to deprive of prize-money all flag officers who are returning home under all circumstances whatever. It is well known in point of fact that officers have been sent for home that Government might consult or advise with them—they may render the public as essential service by their return on such an account as if they had remained on their station. It would be hard that in such case they should lose the emolument of prize-money, which is a mere gratuity from the country, and disposeable at the discretion of the Crown. Unless the words of the proclamation make such a construction absolutely necessary, I cannot assent to it. And as to the danger of abuse, I will not presume that the Board of Admiralty will abuse their trust: but if they are disposed to do so, they

1802.

Ld. Nelson v. Tucker.

(who probably have great influence in settling the forms of these proclamations), may, by changing the terms of them in future, be either enabled or restrained, as his Majesty may be advised to order. So, with respect to the objection of an officer's returning home on account of health, when the Admiralty give him leave, they may qualify their leave as they think proper. They may order that he shall resign his command, they may appoint another officer to succeed or relieve him; and if they do, when he leaves the fleet he may leave it under another command. But when the Board of Admiralty indulge a flag officer with a temporary leave of absence on account of his health (injured probably by his exertions in the public service) and suffer him still to retain his character of commander in chief, and correspond with him in that character, and do not appoint a new commander in chief till the officer who has returned home relinquishes the command, I think the Admiralty by this practice draw the line as to their idea of who has the command of the fleet, and who has not, within the terms of the proclamation, and declare that the fleet is not under another, but under the same command, till a new commander in chief is appointed. Another observation occurs to me: flag officers may be presumed, from their rank and experience, to be better qualified to command fleets than captains are. Now according to the construction contended for by the Plaintiff, the case of a flag officer leaving his station and returning home, would stand thus: if he left his fleet under one less qualified to command, he would share prize money with him; if he left it under the command of one who by his rank was to be presumed to be qualified to command, he would lose all the emolument of prize money. This surely would not promote the public service. If we could suppose sordidness to attach on the naval character, it might rather tempt a chief flag officer to send his inferior home on some pretence or other, that by leaving a captain only behind, he might retain his chance of prize money. A case was put in the course of the argument, to which no answer was given which was satisfactory to my mind. Suppose the second in command to die, and a captain to take the command as senior officer, are the captains then under no flag, or does the right of the chief revive? What shall we say as to these difficulties? Are they owing to omissions in the proclamation, or do they flow only from a mistaken construction of it? By the 6th clause of the proclamation, when more flag officers than one serve together,

1802.

Ld. Nelson v. Tucker.

together, the eighth of the prizes taken by any ſhips or veſſels of the ſquadron ſhall be divided in the following proportions; if only two, the chief ſhall have two thirds, if more than two, the chief only one-half, and the other one-half to the reſt. Here the flag officers are conſidered as ſerving together, though they ſerve at great diſtances from each other, if they are under the ſame commander in chief. Lord *Nelſon* at the *Nile*, and Lord *Keith* off *Cadiz*, were each entitled as flag officers to a ſhare of the prizes taken by the cruizing frigates, though the captains of the frigates received their orders from Lord *St. Vincent* as the commander in chief, and though theſe inferior flag officers had no concern whatever in the capture. It is not therefore the real merit of the flag officer in reſpect to the particular ſervice that intitles him to his ſhare of prize money, but it is rank and ſtation and the general ſervice which he renders or is preſumed to render to the ſtate by acting in his particular department in the ſquadron. In the preſent caſe it would be difficult to aſſign any real moral merit which ſhould intitle either of theſe contending parties to ſhare in this capture rather than the other. The Plaintiff gave no orders to the captain of the *Alcmene*, the commander in chief did. Neither were preſent at the capture. The commander in chief was abſent from his ſtation on account of health; the Plaintiff had the actual but ſtill only the occaſional command of the fleet in his abſence. The right therefore is a technical or artificial right, and muſt be decided ſolely by the terms of the proclamation and the courſe of the ſervice. The chief flag officer came home with leave, was addreſſed by the Admiralty Board as commander in chief, and received pay and table-money as commander in chief. The flag officer who was left on the ſtation received table-money (very rightly becauſe his expences were neceſſarily increaſed), but had no appointment as commander in chief till ſome time after this capture. Hence it appears the Admiralty Board recognize the diſtinction between an occaſional and a permanent commander, and allow under circumſtances the permanent commander in chief to be abſent, and the next in ſeniority to command proviſionally during his abſence; that during ſuch time they ſtill conſider the abſentee as the real chief flag officer, and the other as acting under his implied command. The admiralty-letter to Lord *Nelſon* of the 20th *Auguſt* 1799, has the following paſſage: "You are now become the ſenior flag officer, and you will have all the important duties of that ſtation

ftation to attend to. It is probable Lord *Keith* will have left for your lordfhip's information and guidance fuch orders and inftructions as he may have received either from their lordfhips or from Lord *St. Vincent*." It does not addrefs Lord *Nelfon* as commander in chief; but it confiders him as poffibly ftill acting under inftructions from a fuperior officer. While this is the avowed practice of the Admiralty Board, I confider the proclamation as adapted to it, and muft conftrue it accordingly. Upon the whole I am of opinion that comparing the feveral parts of this proclamation together, and confidering the courfe of the fervice, and the proceedings of the Board of Admiralty in refpect to thefe parties, the true meaning of this proclamation (which however I admit to be equivocal), is, that a chief flag officer returning home and retaining his character of commander in chief does not, by leaving an inferior flag officer to command in his abfence, leave the fhips to act under another command. I fee no greater danger in this than in the contrary conftruction, and I am the more eafy under the opinion I have formed, becaufe it is a queftion which concerns two individuals only, and will not lead to any general confequences: for I am fully perfuaded that before we fhall have occafion for the further fervices of thefe or any other naval officers, his Majefty will be advifed to iffue fuch a proclamation for the diftribution of prize money as will effectually prevent any difpute fimilar to the prefent. I think judgment fhould be given for the Defendant.

Heath J. The claim of the Plaintiff is founded on the fourth claufe of the King's proclamation for the diftribution of prizes among the flag officers, which declares that the flag officers "returning home from *Jamaica* or elfewhere, fhall have no fhare of the prizes taken by the fhips or veffels left to act under another command." However clear the conftruction of this claufe may be in my apprehenfion, yet the difference of opinion which fubfifts between us, and the deference I owe to my brothers, who differ from me in opinion, induce me to think it loofely, inaccurately, and ambiguoufly worded. Two different interpretations have been given to it. And whether it is to be underftood in the one or the other fenfe muft depend on the intention of the framer fo far as it may be collected by comparing this with the other claufes of the proclamation. If that be ftill doubtful, recourfe muft be had to grammatical conftruction and verbal criticifm. Confiderable affiftance may be derived from comparing the prefent proclamation

1802.
Ld. Nelson v. Tucker.

with antecedent ones on the ſame ſubject. On the part of the Plaintiff it is contended that the words "the ſhips or veſſels left to act under another command," import the command of another admiral. On the behalf of Earl *St. Vincent* it is inſiſted, that the flag officer, though returned home and here in port, is entitled to his ſhare of prizes, inaſmuch as he retains the command until he be ſuperſeded. Firſt, To conſider the different parts of this inſtrument. The firſt clauſe being to veſt a certain ſhare of prizes in the commanding flag officer, the ſubſequent clauſes go, in certain caſes, to abridge that right. The object or policy of theſe limitations ſeems to be this, that flag officers ſhall be ſtimulated to an active diſcharge of their duty, and to be preſent with their ſquadrons after they have entered on their command, and that they may not be tempted to loiter in port by a full aſſurance of ſharing in the prizes that ſhall be taken without incurring the riſk of war or climate. The ſecond clauſe is *in pari materiâ* with the fourth. By the ſecond clauſe, the flag officer is not entitled to a ſhare of prizes "before he arrives at the place to which he is ſent, and actually takes upon him the command." Now it would be a ſtrange overſight, in drawing this proclamation, to enforce the preſence of the admiral until he has joined his ſquadron, and after he has joined it, not to enforce the continuance of his preſence with it. Excuſes that may be made for diſpenſing with abſence, as ill health, or the urgency of private affairs, can ſeldom be accurately aſcertained. It was a wiſe policy to hold out ſuch encouragement to flag officers, as ſhould make it their beſt intereſt, as well as their duty, not to abſent themſelves from their ſquadrons on ſlight and trivial occaſions. The proclamation of 1740 allots a ſhare of prizes to the flag officer being actually on board the ſhip, or directing and aſſiſting the capture. Probably in framing the proclamation it was intended to exclude the abſent flag officer who had never actually taken upon himſelf the command. If it were ſo, that intention was not ſufficiently expreſſed. The proclamation of 1744 aſcertains its intent and policy moſt indiſputably. And if it had not been altered the claim of Earl *St. Vincent* muſt have been barred. For, by the fourth clauſe, the flag officer was to receive no ſhare of prizes after he had got out of the limits of his command. The alteration in the ſubſiſting proclamation introduces all the difficulty in this caſe. Was the policy then changed, or was it intended to relax the diſcipline of the navy? That never can be imagined to be

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1802.

Ld. Nelson v. Tucker.

the caſe. The true reaſon of this alteration, as I conjecture (and I deſire it may be taken as only a conjecture on which I do not found my judgment), was accurately to fix the time when the flag officer returning home ſhould ceaſe to be entitled to his ſhare of prizes. Probably ſome diſpute or litigation had ariſen on that ſubject. The moment of the capture of a prize was always eaſily aſcertained by entries in the log-book of the capturing veſſel. But it was not ſo certain when the Admiral had paſſed the capes or headlands which formed the limits of his ſtation. They might have been paſſed in the night time, in hazy weather, or at ſo great a diſtance as to be out of ſight. This muſt have opened a great field of litigation. But the departure of a flag officer from his fleet on his return homeward can be aſcertained to a moment. So that, by comparing the ſeveral entries in the log-books belonging to the ſhip of the flag officer and of the capturing ſhip, it might eaſily be aſcertained whether or no the flag officer had a right to ſhare the prize. A conſequence indeed has followed from this alteration, namely, that as in the caſe of the *Saint Anne*, an admiral quitting his ſtation and leaving the command to a ſenior captain will be entitled to his ſhare of prizes until he ſhall be ſuperſeded. This is by neceſſary conſtruction. It is not ſo expreſſed. I muſt think it an overſight, for I never can preſume that ſuch a flag officer would be ſo much favoured as to have an alteration made and the diſcipline relaxed in his favour. No principle of public policy, no conſideration of naval diſcipline, could have authoriſed this alteration for the purpoſe of entitling ſuch a flag officer to ſhare. And taking it in another point of view, that the alteration was made for the reaſon that I have conjectured, or to avoid ſome other inconvenience which does not at preſent occur, there is nothing ſo common in the framing of inſtruments as that whilſt the framer of them is ſtudious to avoid one inconvenience, he incurs another which does not preſent itſelf to his view. This is often to be ſeen in acts of parliament. Much more is ſuch an inaccuracy to be expected in framing an inſtrument of this ſort. Some argument may be drawn from the phraſeology of this proclamation. The actual preſence of the admiral to entitle him to a ſhare of prizes is curſorily mentioned in the proclamation of 1740. It is more enforced in the proclamation of 1744, and moſt of all, in the ſubſiſting proclamation. In the ſecond article of the ſubſiſting proclamation, the flag officer is not entitled until he actually takes upon him the command. And ſo in the third

1802.
Ld. Nelson v. Tucker.

third clause, the flag officer there described shall not be entitled until he actually receives some order from his superior flag officer. Now, the word "actually" in the corresponding clauses of the antecedent proclamations is not to be found. It would be strange to suppose that an actual arrival should be necessary, and be anxiously required, to entitle the flag officer to his share of prizes, and yet his actual continuance should be dispensed with, even after it had been enforced by an antecedent proclamation. Next I shall consider what is the grammatical construction. "Another" is a relative pronoun. The rule of grammar, of logic, and of law, is the same. *Fiat relatio proximo antecedenti.* There is no other antecedent but "flag officer." There is no other subject of this part of the proclamation. That construction of the clause in question seems to be most probable in which the strict grammatical construction coincides with the professed object and avowed policy of the instrument. The decision of the Court of Admiralty in the case of the *St. Anne* is founded on this construction; for the flag officer was holden to be entitled to a share of prizes, because he had not left the command under another flag officer. The word "command" has two significations. In a limited sense it implies, either the immediate power and authority of a flag officer to direct the motions of a squadron, in which sense it is used in the correspondence between the Plaintiff and Earl *St. Vincent*; or in a more extensive sense, the paramount authority which the flag officer holds and retains whilst he is continued in the same service, whether absent or present. The former meaning corresponds, in my judgment, with the true intent of the proclamation. It cannot be disputed but that the Plaintiff had, in some sort, the command; for he corresponded directly with the Admiralty, and had a table maintained for him. Having considered the claim of the Plaintiff, it remains to consider the construction put on this clause by Earl *St. Vincent*'s Counsel, *viz.* that he was entitled to retain the command till he was superseded. That must have been the case if the fourth clause had been omitted. This is the "*maledicta interpretatio quæ corrumpit textum.*" What greater corruption of the text can there be than to annihilate all its sense and meaning? The proclamation ought to receive a liberal construction, the more especially as it is explanatory of a former proclamation. And, when a person undertakes to explain his own meaning, we are not to extend the same by construction. It is so in statutes. But there seems to be a

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clear objection to it; which is, that it renders the clause nugatory and superfluous. It is a strange supposition that the corresponding clause in the antecedent proclamation, which has a clear determinate meaning, should be altered to introduce another clause destitute of all effect whatever. If there be two interpretations of a clause, and the one of them gives a clear meaning, and the other affixes no sense but what would otherwise be necessarily intended, it is easy to decide which of the two interpretations ought to have a preference. It should be so construed "*ut res magis valeat.*" A supposed case of hardship has been put at the bar; that a flag officer might be called home to consult with the Lords of the Admiralty, and in such event, it would be hard to deprive him of his share of the prizes taken in his absence. To that I answer, no such case has ever occurred in the naval history of this country so far as I recollect. If it should exist, it might be lamented. But proclamations, like laws, are adapted to cases that usually happen. It has been argued at the bar in the present, as it was by the Counsel in the case of the *St. Anne*, that the share of the flag officer was given to him on account of his responsibility, and therefore, whilst the responsibility lasts, his title to a share must continue. I have not yet learned where that principle is to be found. It is not so expressed in the proclamation. The responsibility of the flag officer is not co-extensive or co-existent with his title to a share of prizes. It commences before he arrives on his station and actually takes the command of the squadron, and may well continue after he has left the command to another. Is not a share of the prizes proportionably given according to rank and station to every commissioned officer? and are they not all responsible in their several employs? If the flag officer in port, after leaving the command to another, be entitled, surely the flag officer before he has joined his squadron ought equally to be entitled, which is not the case. From hence I infer, that it was never intended that the title of the flag officer to a share of prizes, according to the true intent and meaning, as well as to the spirit and the policy of the instrument, should be co-existent with the command. Suppose a flag officer, ordered to take the command of a distant squadron, loiters in port, and neglects to transmit the orders he receives from the Admiralty; surely he is responsible. And yet he is not entitled to a share of prize-money by the proclamation. For these reasons, I am of opinion, that judgment ought to be for the Plaintiff.

1802.
Ld. Nelson v. Tucker.

Lord Alvanley Ch. J. I cannot fufficiently lament that I fhould be called upon to give my opinion upon the interpretation of a proclamation refpecting a fubject of this nature. But, as the law calls upon me to put a conftruction upon it according to the beft of my judgment, I have only to look at the proclamation with reference to the fubject which it concerns. I agree with my Brother *Rooke* completely in thinking, that a proclamation of this nature ought not to be conftrued according to the fenfe which, at the firft reading of it, a perfon may put upon the words that it contains: for it relates to a fubject which embraces a variety of confiderations, and admits of a great number of refinements. It is impoffible for any man to take upon himfelf to decide upon the conftruction of a proclamation refpecting prize, without informing himfelf as accurately as poffible of all the determinations that have taken place in courts of juftice, and of the continued practice of the Admiralty with refpect to the diftribution of prizes under fimilar proclamations. I lament the more that I am called upon to decide in this cafe, becaufe I confefs that I feel this to be a very doubtful queftion. I the more lament it, becaufe the confequence of thefe doubts having impreffed upon my mind an opinion correfpondent with that of my Brother *Rooke* is, that, as far as this Court is concerned, unlefs the parties fhould defire it, no judgment can be given. In conftruing this proclamation I am under the neceffity of inquiring what have been the former proclamations on the fame fubject, that I may conftrue this act of the Sovereign by his antecedent acts, comparing the one with the other. I muft therefore look back to the manner in which the firft law upon the fubject was promulgated by his Majefty, in whofe breaft the whole matter refted. Before the year 1740, it muft be admitted, that when a proclamation gave to the flag officers the fhare of prizes taken by fhips acting under their command, it did not mean an actual command; it did not mean an exifting command operating upon the particular fervice then done; but it was underftood, and it was, I think, admitted in argument, that before that time, and down to the year 1744, the moment that an officer was appointed to any command he was confidered as directing every operation that was done by any of the fhips which were under that command to which he was appointed. It was therefore an ideal direction, not an actual one that was fufficient. With refpect indeed to inferior captains and other officers of inferior rank, actual co-operation and

affistance in the capture itself was necessary. The words of the proclamation which speak of superior officers are, "directing or assisting." Then what has been understood to be meant by the word "directing?" It need not be immediate direction by the party himself; for it has been uniformly admitted in the argument, that a direction given by one officer devolves upon his successor who comes in his place, and will be considered as his direction. Then I am to understand that up to the year 1744 this was the received law respecting the distribution of prizes among superior officers; namely, that every superior officer was considered as directing, who had that command which the person giving the direction had; and that he took it with all its rights, although he himself had never done any one act in pursuance of that command; that every direction given by the person in whose room he came devolved upon him; and there was a constructive direction attaching to his person. That, I think, is the fair import of the law as it stood prior to the year 1744. In the proclamation of the year 1740 the words are, "amongst such flag officers as shall be actually on board or directing and assisting;" but that is corrected, and I am happy to find it is, because if it had not it would have raised a difficulty; the word "and" is changed into the word "or," and it now stands—that the prize is due to those that are on board, or to any person who either actually or legally shall be considered as "directing or assisting in the capture." Then, before the year 1744, such was the law: whether absurd or not, whether it led to consequences injurious to the service or not, I do not take upon myself to decide. But, unquestionably, that was the understood practice, and I call it the law of the navy. In the proclamation of 1744 the King thinks fit to add a restriction to this law, which imputes a virtual direction to persons who really have given no actual affistance. Now, let us see to what extent he so restrains it. I suppose an inconvenience had been felt, that officers were appointed at home and perhaps never went out at all: and therefore the King thought fit to alter the law to a certain degree. The proclamation of 1744 goes on pretty nearly in the same words with respect to vesting the prize as that of 1740, *viz.* "But, in case any prize shall be taken by any of his Majesty's ships of war under the command of a flag or flags, the flag officer or officers being actually on board, or directing or assisting in the capture, shall have one-eighth." Then it proceeds to state, what shall be the

1802. Ld. Nelson v. Tucker.

the caſe of a flag officer returning home; and in order to narrow the right which would have been given by the ſuppoſed devolution upon him of all the powers given to his predeceſſor, it declares as a reſtriction upon the right, "that no flag officer returning home ſhall ſhare in any prizes that ſhall be taken by the ſhips which he has left behind, after he ſhall have got out of the limits of his ſtation." Nobody, I apprehend, will deny that, as the caſe ſtood upon that proclamation, if a flag officer had returned home leaving his ſhips under the command of a captain and not a flag, he would equally have ceaſed to be entitled to his ſhare. Moſt certainly he would. The meaning is this; we will not permit an officer, after he has left his ſtation, to ſhare in any prizes, under whatever command the ſhips may be left, whether under the command of a perſon of his own rank, or an inferior rank. It is a poſitive regulation, that under all given circumſtances whatever, the chief flag officer returning home after he has paſſed the limits of his command, ſhall ceaſe to have any ſhare of prizes taken by the ſhips left behind, without conſidering whether thoſe ſhips, when he is ſuperſeded, ſhall be under the command of a perſon of a ſuperior flag or not. I underſtand, that many eminent perſons think that was the beſt policy, and that as ſoon as the commander in chief went beyond the limits of his command, and ceaſed to be capable of giving directions, he ſhould be conſidered as if actually dead with reſpect to prizes. Thus the matter ſtood upon that proclamation; in the application of which no doubt could have ariſen except from the difficulty of aſcertaining the very moment he had paſſed the limits, which, however, I do not apprehend to be attended with ſo much difficulty as may be ſuppoſed. But his Majeſty was not ſatisfied that this was the proper rule, and in the year 1756 the preſent proclamation was ſubſtituted in the room of it. And now we are to conſider what ought to be the conſtruction put upon the words which his Majeſty has thought fit, in the proclamation of 1756, to ſubſtitute in the room of thoſe plain words I before ſtated, and which would have left no room at all for doubt. If it had been the object of his Majeſty to lay down that, from the moment an admiral quitted his ſtation he ſhould loſe his prize-money, he could not have made the words plainer, except by aſcertaining the particular time at which this ceſſation of his right ſhould take place: inſtead of this, however, the words before ſtated are ſub-

ſtituted,

1802.

Ld. Nelson v. Tucker.

ſtituted, and they are the words which unfortunately give riſe to this queſtion. The former proclamation had reſtrained the right to the caſe of the commander in chief giving directions, and acting in his ſtation. Inſtead of that, the King has thought fit, as I think, to take away part of that reſtriction. When I look back and conſider the adjudged caſes that have taken place ſince, I am bound to ſay that this was not meant to make the rule more rigorous, but was rather a relaxation of it. I do not enter into the policy of the alteration, having nothing to do with that. When Lord *St. Vincent* had ſet ſail to come home, can any body doubt that he might have returned back? Indeed the rule no longer reſts on the circumſtance of the commander having paſſed the limits of his ſtation. The perſon who ceaſes to have a right to prize-money is "an admiral returning home, leaving ſhips to act under another command." It is ſaid theſe words, "under another command," are nugatory. They are ſo if they mean only what is now contended for, becauſe the ſhips muſt be left under another command; he could not go away without leaving them under ſome other command. Then, was it meant that an admiral returning home, if he did not leave the ſhips *to act* under another command, (for I cannot help thinking that there is a great deal in the words "to act,") ſhould not ceaſe to ſhare in prizes? If it meant only what the former proclamation did, he muſt have left ſhips to act under ſome other command; for the law would create a command in the perſon next in ſeniority to him. Therefore I cannot help thinking his Majeſty muſt have meant another command with reference to ſomething ariſing out of the nature and uſage of the ſervice. And what is conſtrued another command under theſe words is the only queſtion. Now I think a great deal ariſes from the word "home," if we attend to the policy of this regulation. If it were meant to encourage perſons to remain upon their ſtations, and not to invent excuſes for returning, but that they ſhould do ſo at the peril of loſing their ſhare of prize, why ſhould the words "return home" only have been uſed? why ſhould not the proclamation have ſaid, "abſent from their ſtation, leaving ſhips under another command?" Suppoſing Lord *St. Vincent*, inſtead of coming home, had obtained leave to go to *Liſbon* for his health, he then would not have fallen within theſe words; he would not have been an admiral returning home, leaving ſhips or veſſels to act under another command; but he would have been an admiral leaving ſhips

 under

1802.
Ld. Nelson
v.
Tucker.

under the command of the next flag officer. I suppose nobody will contend that he could not have shared then. Therefore, when I see what these words are, I cannot but conceive that the framers of that proclamation meant to make a very essential alteration in the regulations respecting an admiral quitting his station; and that it was not the intention that it should include every man that should leave his station for any reason whatever; but that an admiral under the particular circumstances of returning home leaving the ships under another command, though he continued in the commission, should not share in prizes. I now come to consider the meaning of the words "another command." It is said that by these words must be meant the command of another flag officer. Now I confess I do not see any necessity for that. I think his Majesty must have meant by the words "another command," that when an officer comes back from his station, not temporarily, not with a determination of returning, but with an intention of leaving the fleet to act under the command of a person to be appointed in his room, that officer so returning shall not share. The former words would have answered every purpose if the object had been what it is contended ought to be the object of the proclamation. And therefore his Majesty having thought fit to alter these words, we are bound to construe them according to the usage of the navy with respect to the subject matter, and to put such an interpretation upon them as will give a real effect to the words, and not a nominal one. This is the construction I put upon the proclamations themselves, without any assistance from adjudged cases. It remains then to be considered whether any interpretation has been put upon them by subsequent usage. There was some evidence of usage which I did not think sufficient to constitute an usage. Let us then consider the adjudged cases; each party insisting as they do, that the adjudged cases, as far as they go, are in his favour. The cases are, *Taylor* v. Lord *Harry Paulett*, *Pigott* v. *White*, *Johnstone* v. *Margetson*; and lastly, the case of the *Saint Anne*; a case which, if we can collect the opinion of the learned judge who decided it, is undoubtedly of the greatest authority, and such as I should be glad to recur to in a question like the present, which I do not profess to decide without considerable doubts. In the first case of *Taylor* v. Lord *Harry Paulett*, the Plaintiff, who was captain of a ship under command of Lord *H. Paulett*, sailed under orders to cruize from his lordship, who, before the prize was taken,

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was superseded by Admiral *Smith*, upon which the Plaintiff insisted he was entitled to the whole share. There Lord *Mansfield* was clearly of opinion that the captain was certainly under the command of some flag officer; but whether under the command of Admiral *Smith* or Lord *Harry Paulett*, was not material to the claim of the Plaintiff. He certainly did act under the command of one or the other: consequently the whole share did not belong to him. The opinion of Lord *Mansfield* in that case shews that there is no necessity in point of law that a flag officer should share, only that if there should be any flag officer commanding, he should be entitled to his eighth. The next case is that of *Pigott* v. *White*, which certainly throws some light upon a subsequent point of this case, which I will just mention before I close what I have to say, namely, Lord *Nelson*'s right to share, supposing Lord *St. Vincent* not to have any right, upon which a great question was raised at the trial, which may possibly be the subject of discussion hereafter before another tribunal. But the case of *Pigott* v. *White*, I think, determines only this; that when Admiral *Pigott* came upon his station and gave orders to Admiral *Digby*, he, as it were, adopted the orders given by Admiral *Digby*, and took them to himself; and that very ship to which Admiral *Digby* had given orders was from that time to be considered as acting under his orders. It goes a great way, however, towards proving that if Lord *Nelson* may be considered as a person having another command, he must be considered as having virtually directed Captain *Digby*, as well as the other ships. But I think that case proves nothing more. Then comes the case of *Johnstone* v. *Margetson*, which was argued twice here. It is very true that the judgment does not touch this point. It only decides that previous to the capture, *Johnstone* had, to all intents and purposes, ceased to have either an actual or virtual command over the officer commanding the capturing ship. The argument proceeded upon grounds nearly similar to the present, but the Court did not choose to decide upon them. The point there contended for was at least doubtful at that time, and certainly may have been considered as such ever since. It was argued, that there must be another flag officer, under whose command the captain must pass. But it was there answered, that the fourth clause of the proclamation does not imply that another flag officer must be left in command, for that the command of the senior captain left behind was sufficient to answer the words of the proclamation, and it was not necessary

 that

1802.

Ld. Nelson v. Tucker.

that another flag officer should be appointed to put an end to Commodore *Johnstone*'s command, which determined by his appointment to the expedition against the *Cape of Good Hope*. Where a flag officer quits his station to return home, the command devolves upon the senior captain. But if it be thus when he is returning from his station, it must be so when his command is actually determined. These were the arguments; and I think they were very conclusive. At least I think that, independent of the authorities, they were well founded. I admit, however, that the case determined nothing, for though the point was raised, we cannot find the least inclination in the Court to decide either one way or the other. Then comes the case of the *Saint Anne*. I admit that the learned judge has not decided that case upon the point which arises here, because he decided it upon the ground that Admiral *Murray* had not abdicated his command. But I say that would not have been the ground of this decision if his opinion had coincided with what the King's advocate at the latter end of his argument threw out, namely, that the command must devolve upon a flag officer, or it will be at an end. I have looked carefully into that case. All the arguments of the King's advocate, till the very last, are in favour of the Defendant in this action: for he contends throughout, that an officer, in order to be barred, must have left the ships under the command of some person superseding him in the very command which he was then leaving; and that if it was a temporary absence only, he would not be barred. The circumstances of that case were almost the same as in the present case, with this difference only, that Captain *Mowatt* was not an admiral. Admiral *Murray*'s orders to him were as strong and as extensive as those which Lord *St. Vincent* gave to Lord *Keith*. He put under his command *per* margin the very ship, by name which took the prize. " You are to take under your command the ships in the margin," of which *La Raison* was one. So that, to all intents and purposes, there was as complete a command devolved upon Captain *Mowatt* as upon Lord *Nelson*: with the difference only, that one had a flag, the other had not. Admiral *Murray* having left the ships under Captain *Mowatt*, as, in the present case, was left to Lord *Nelson*, with a command as extensive, wrote this letter: " Whereas I think it necessary to proceed to *England* in his Majesty's ship *Cleopatra* without loss of time, you are hereby required and directed, during the time of my absence, or until the arrival of another

another commander in chief on this station, to take the ships and vessels named in the margin under your command, and any other ships commanded by a junior officer to yourself." Then, had he left the ships under another command? It was determined he had not. But it was said the learned Judge determined that cause upon this simple circumstance, that the person whom he then left in command was not a flag officer. It is not necessary for me to state at length the arguments, but in every one of them, except the last, it is strongly urged by the King's Advocate that the words of the proclamation must be understood of one who had actually and intentionally quitted and abdicated his command. Then he goes on to give instances of his not having done so, such as his secretary's salary being continued, and that the duties and emoluments of his office must be deemed reciprocal; that he must be still considered as a person not having abdicated his command or left it for the purpose of putting it under another command within the meaning of the proclamation. Then he says the whole clause must be understood to refer to another appointment under a flag officer, and like a judicious advocate he avails himself of that argument. Then comes the judgment of the Court; and if Sir *William Scott* had put the same construction upon the proclamation which we are called upon to adopt on the part of the Plaintiff, I cannot conceive that he could have given the sort of judgment that he did give, for it would have been a much shorter answer to have said that Admiral *Murray* must have left the ships under another command, with which command Captain *Mowatt* was not invested, the meaning of the proclamation being "left under the command of another flag." If that had been Sir *William Scott*'s opinion, I cannot but believe that it would have been the foundation of his judgment. But I think it was his opinion, that Captain *Mowatt*'s was another command, not because he was not an admiral, but that it would have been another command if Admiral *Murray* had come home with an intention of abdicating his own command. The judgment is very short, and plainly proceeds on the mere point of Admiral *Murray*'s not having abdicated the command: and there is not one syllable which falls from Sir *William Scott* from whence it can be collected that he would have been of a different opinion if Captain *Mowatt* had been a flag officer. I cannot help, therefore, thinking, that the construction which that learned Judge put upon the proclamation was not that which is

now

1802.
Ld. Nelson v. Tucker

now attempted to be put upon it by the Plaintiff. And I consider that case, though not a determination upon the point, yet indicative of the opinion of a very great Judge respecting the construction of this proclamation. This being the case, let us consider what circumstances took place to indicate whether Admiral Lord *St. Vincent* was or was not an officer returning home with an intention of leaving ships to act under the command of some superior officer to be appointed in his room: for I do admit that if he came home, or was recalled, not for a temporary purpose and with an intention of returning back again, but leaving ships to act under another command, not his own, Lord *Nelson* would be entitled. But Lord *Nelson* was, according to my apprehension, acting during the whole time under the command of Lord *St. Vincent*. It is true that the letter which Lord *St. Vincent* wrote has the word "relinquish" in it: and it does appear from thence that he had some thoughts of totally relinquishing the command. But Lord *St. Vincent* said, he should not relinquish the command till circumstances made it necessary. He was told, "Whenever your health requires it, you may come to *Great Britain*." Nor did he come to *Great Britain* with an intention of relinquishing that command. Is there any thing in this from whence it can be collected that he came home, the Admiralty having an intention to appoint another commander to supersede him? When Lord *St. Vincent* came home he was received as commander in chief; he was corresponded with as commander in chief; he gave orders as commander in chief; and it was a considerable time before he actually resigned that command and another officer was appointed. Now, who was the commander under whose virtual orders Captain *Digby* acted? I say Lord *St. Vincent*; he never left that command. I think Lord *Nelson* was acting under Lord *St. Vincent*'s orders; the latter being the commander of that squadron, though he was not within the limits of the station, which was made unnecessary by the proclamation of 1756. He was not an admiral "returning home;" for I lay great stress upon that. I cannot conceive that if the words had been meant to apply to every case where ships were left acting under a flag officer, they would be confined to the case of an officer returning home; for the spirit of the proclamation then would be, that whenever one flag officer left the fleet under the command of another flag officer, the former should have no share. The only question then is, Whether Lord *St. Vincent* falls within

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the words "leaving the ſhips to act under another command." The facts are indicative that he was in the very ſituation in which Admiral *Murray* is pronounced to have been by Sir *William Scott*. He had not left the ſhips to act nnder another command. And I conceive that authority goes to prove that Admiral *Murray* had not left the ſhips under another command, not becauſe the perſon happened not to be a vice-admiral, but becauſe Admiral *Murray* had not abdicated the command. Then the conſtruction I put upon it is the ſame with my Brother *Rooke*'s. I do not pretend to ſay I look upon this as a very clear caſe; far from it; I have turned it over and over again in my mind. I am under the neceſſity, however, of putting the beſt conſtruction I can upon the proclamation, and of making it conformable to what I conceive to be the real intention of his Majeſty. Upon the whole, I am of opinion that the proclamation of 1756 did not mean to enforce or to extend the proclamation of 1744; that it meant to explain it, or rather to relax it, and to ſay, that a commander in chief, merely going out of his ſtation, and ceaſing to execute the active duties of it, ſhould not therefore be excluded from prize; but only where he put the fleet under the command of ſome other perſon who was to take his ſtation, and fill that poſt which he before had filled. I cannot put any other conſtruction upon the words "returning home." And I confeſs I have not heard that difficulty anſwered which was urged at the bar, and which my Brother *Rooke* referred to; namely, If Admiral *Murray* had left a vice-admiral, then he would have left the ſhips under another command: but if that vice-admiral had died, then would Admiral *Murray*'s right have revived or not? I am extremely ſorry to be under the neceſſity of giving an opinion by which the parties will be deprived of the benefit of any judgment in this Court. My opinion, however, is, that by the true conſtruction of this proclamation the words "another command" do not refer to the command of a perſon acting under the orders of the officer who quits the ſtation; but that the proclamation was only intended to exclude from ſharing in prizes a commander who, without any intention of returning, comes home and is ſuperſeded by another officer. The conſequence is, that there can be no judgment given by the Court, unleſs the parties pray to have a judgment given.

On an intimation from the counſel for the Plaintiff that they wiſhed the judgment of the Court to be pronounced againſt their

1802.
Ld. Nelson v. Tucker.

client, in order that the case might be carried into a court of error, Mr. Justice *Heath* withdrew his opinion and the *Court* gave

Judgment for the Defendant.

Nov. 27th.

Parker *v.* Pistor.

If a *fi. fa.* issue against one of several partners, the Court will not at the request of the partnership-creditors give the sheriff time to return the writ until an account can be taken of the several claims upon the partnership property.

This was a rule calling on the Plaintiff to shew cause why the sheriffs of *London* should not have time to return a writ of *fieri facias* to the first day of next term.

The Defendant was one of two partners, and the application was made on the part of several creditors of the partnership, and the object was to prevent the partnership goods from being sold until an account could be taken of the several claims upon this property.

Best Serjt. who obtained the rule, observed, that the sheriff was only entitled to take possession of an undivided, not of a separate moiety of the partnership goods; that he could only hold that moiety in the same manner as the Defendant himself had done, and that as the Defendant was not entitled to sell the partnership goods without the consent of his partner, the sheriff ought not to be obliged to do so by a writ of *venditioni exponas.* He mentioned a case in the Court of King's Bench where a similar application had been made, which stood over several terms, and the rule was at last made absolute by consent, the Plaintiff having been driven to give that consent in consequence of Lord *Kenyon* saying that the Court would enlarge the rule from time to time until the parties did consent. He also referred to *Eddie* v. *Davison*, *Doug.* 650. and *Taylor* v. *Field*, 4 *Ves.* Jun. 396. where it was holden that the joint property of an insolvent partnership taken in execution for a separate debt could not be retained against the joint creditors.

Lens Serjt. *contrà*, insisted that this was merely the common case of partnership goods taken in execution; that if the Defendant had any interest whatever the sheriff was bound to take the partnership goods and sell them; if not, he ought to return *nulla bona.* He observed that in *Taylor* v. *Field* it was admitted that the above rule would prevail at law, and in *Pope* v. *Haman*, *Comb.* 217. this distinction is pointed at, *Holt* Ch. J. saying, "upon a

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judgment againſt one co-partner the ſheriff may take the goods of both in execution, and the other co-partner hath no remedy at law otherwiſe than by retaking the goods if he can; for the vendee of the ſheriff becomes tenant in common with the other co-partners."

The Court were of opinion that there was no ground for their interpoſition; that it was a very plain caſe at law, and that all the difficulties were to be encountered in equity; that the ſafeſt line of conduct for the ſheriff to purſue was to put ſome perſon in poſſeſſion of the Defendant's ſhare as vendee, leaving him and the parties intereſted to conteſt the matter in equity, where a bill might be filed, ſtating that he had taken poſſeſſion of the property, and praying that it might not be diſpoſed of until all the claims were arranged.

Rule diſcharged.

CHAPMAN *v.* KOOPS.

Nov. 29th.

A *fi fa.* having iſſued againſt the effects of the Defendant, who was jointly concerned in a manufactory with 25 other perſons, to whom he was indebted to a greater amount than his whole ſhare, and the ſheriff having ſeized the whole of the partnerſhip property, the Court refuſed to refer it to the prothonotary to inquire what was the Defendant's intereſt in the effects ſeized.

THIS was a rule calling on the Plaintiff to ſhew cauſe why it ſhould not be referred to the prothonotary to inquire if the Defendant had any and what intereſt in the effects and premiſes ſeized by the ſheriff under an execution at the ſuit of the Plaintiff. It appeared that the Defendant was one of twenty-ſix perſons carrying on the ſtraw paper manufactory, an undertaking for which a patent had been granted to five perſons originally, and then an act had paſſed enabling them to multiply the ſhares. Under that act the ſhares had been multiplied to twenty-ſix, and the Defendant, for a ſeparate debt of his own of 9000*l.* having been ſued to execution, the ſheriff had ſeized and put an officer into poſſeſſion of the Defendant's undivided intereſt in the manufactory. This application was made by the twenty-five other patentees, who ſtated that *Koops* was indebted to the concern in more than the amount of his ſhare.

Shepherd Serjt. ſhewed cauſe, and inſiſted that if the Defendant had any intereſt in the property the execution was regular; if not, it was the duty of the ſheriff to have returned *nulla bona;* and that if the other partners were deſirous of removing the inconvenience of the execution, they might become purchaſers when the ſheriff proceeded to ſale.

Cockell

1802.
CHAPMAN
v.
KOUIS.

Cockell and *Onslow* Serjts., in support of the rule, urged that unless the Court interfered the whole manufactory would be at a stand; that it was not in the power of the parties who now applied to the Court, to compel the sheriff to return the writ; that several cases had taken place in the King's Bench, where it had been referred to the master to take similar accounts without any consent being stated in the rule, and though in a late case it was expressed to be by consent, yet it appears that the Court drove the parties to that consent by threatening to enlarge the rule from time to time till they did so; and that with respect to the jurisdiction of the Court, it had always been deemed competent to them to interfere to prevent an improper use of their own process.

Lord ALVANLEY Ch. J. I hope this will be the last application that will be made to this Court of a similar nature with the present. It appears to me to be most clear that without the consent of all parties the Court has no right to restrain the Plaintiff from taking advantage of the execution which he has issued. When persons enter into partnership they must be aware that the separate concerns of each partner may in some cases introduce a variety of claims very inconvenient to the general partnership concern. By the law of *England* the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership, and will thereby become a tenant in common with the other partners. This the Plaintiff has done, and we are desired to restrain his execution, because it is alleged that he stands in the shoes of a partner, who would not have a right to molest the other partners until all accounts between them had been settled. But if the other partners wish to take advantage of this circumstance they ought to file a bill in equity against the vendee of the sheriff, or they may buy in the property when put up to sale. It has been said that the Court of King's Bench would suspend the Plaintiff's execution until he consented to an account being taken before the Master; but I do not think we are authorised to take such a step in this case. Indeed I can hardly conceive a case in which we should be authorised so to do.

ROOKE J. (a) If it had been shewn that the Plaintiff had been making use of the process of the Court for the purposes of oppression, it would afford ground for the Court to interfere; but here he is only asserting a fair common law right, from the exercise of

(a) Mr. Justice *Heath* was absent.

 which

1802.

CHAPMAN v. KOOPS.

which there is no pretence for reſtraining him, ſince no miſconduct has been ſuggeſted. Nor are we authoriſed to refer to our officers ſuch matters of account as are the proper ſubjects of inveſtigation in a court of equity.

CHAMBRE J. Nothing has been ſtated to ſhew that any improper uſe has been made of the proceſs of the Court. The law has determined what property the ſheriff may take poſſeſſion and diſpoſe of under an execution; and we cannot erect ourſelves into a Court of equity for the purpoſe of taking accounts without the conſent of the parties. The caſe of *Eddie* v. *Davidſon*, *Doug.* 651. (which has been referred to in ſome of theſe caſes) is eſſentially different; there the application was made by the aſſignees of one partner to have a moiety of the produce of the goods taken in execution for a debt of the other partner, but no objection was made to the ſale by the party applying, or to an account being taken by the Maſter by the party levying, though he denied the title of the inſolvent partner to any of the goods. The ſhort objection to this application is, that the Court cannot direct a partnerſhip account to be taken without aſſuming a juriſdiction that does not belong to it.

Rule diſcharged.

TOUTENG and Another *v.* HUBBARD.

Nov. 29th.

If a *Britiſh* merchant charter a *Swediſh* ſhip on a voyage to *St. Michael's* for a cargo of fruit, and the charter party contain the uſual exception againſt the reſtraint of princes, and the ſhip be prevented from reaching *St. Michael's* within the fruit ſeaſon by an embargo laid on *Swediſh* veſſels by the *Britiſh* Government, the *Swediſh* owner cannot, by proceeding on the voyage after the embargo is taken off, entitle himſelf to recover the freight againſt the *Britiſh* merchant.

THIS was an action brought to recover damages againſt the Defendant for not employing a ſhip in purſuance of an agreement for that purpoſe. It came on to be tried before Lord *Alvanley* Ch. J., and a ſpecial jury, at the ſittings after laſt *Michaelmas* term, when a verdict was found for the Plaintiffs for the ſum of 748*l.* ſubject to the opinion of the Court on the following caſe.

The Plaintiffs being owners of the *Swediſh* veſſel called the *Economy of Stockholm*, on the 13th *December* 1800, entered into the following memorandum for chartering the ſaid ſhip to the Defendant.

" *London*, 13th *December* 1800.

" Memorandum for Charter.

" It is this day mutually agreed between *Hans Peter Schonberg* for and in behalf of the owners of the good ſhip or veſſel called the

1802. TOUTENG and Another v. HUBBARD.

the *Economy of Stockholm*, of the burthen of 180 tons or thereabouts, now lying in the river *Thames*, whereof the said *Hans Peter Schonberg* is master, and Mr. *William Hubbard* of *London*, merchant; that the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed, sail and proceed to *Ponte del Gada*, in the island of *St. Michael's*, or so near thereunto as she may safely get and there receive from the factors or agents of the said merchant a full and complete cargo of fruit in boxes, (*London* market boxes), not chests, the merchant or his agent at *St. Michael's* to furnish the necessary papers for declaring the cargo to be neutral property, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, and being so loaded shall therewith proceed to the port of *London*, or so near thereunto as she may safely get and deliver the same on being paid freight by the merchant, his executors, administrators, or assigns, at and after the rate of nine shillings and sixpence *per* box, with five *per* cent. primage, with two thirds port charges and pilotage, as customary (restraint of princes and rulers during the said voyage always excepted), one half of the freight to be paid at unloading and right delivery of the cargo, and the remainder by a good bill on *London*, at one month after date from the time of delivery. Forty running days are to be allowed the said ship at *Ponte del Gada*, and delivering at *London*. Demurrage ten days at three pounds *per* day, over and above the said laying days. Penalty for non-performance of this agreement, one thousand pounds.

" *Hans Peter Scouberg.*
" *William Hubbard.*

" Signed, being first duly stamped, in the presence of
" *Samuel Marshall.*"

On the 22d day of *December* 1800, which was as soon as the ship could conveniently sail, she departed from *London* on her said voyage, being tight, staunch, and strong, and every way fitted for the voyage; but after she had proceeded some distance she was driven back by contrary winds, and on the 15th *January* 1801, she was stopped in *Ramsgate* harbour by an embargo from the government of this country upon all *Swedish* vessels, and detained by virtue of the same till the 19th of *June* following. The season for shipping fruit at *St. Michael's* was then over, the latest time for ships sailing from this country in order to have the benefit of a

ſeaſon being the latter end of *February*; but the captain, as ſoon as he conveniently could after the ſhip was releaſed, to wit, on the 2d *July* 1801, informed the Defendant that the ſhip was ready to proceed upon her voyage in purſuance of the memorandum for the charter, and offered to deliver up the letters of advice the Defendant had before given him to his correſpondents at *St. Michael's*, if the Defendant would give him others in their ſtead. The Defendant declined giving him any anſwer till he had conſulted his attorney, and on the 4th *July* the Defendant gave the captain the following written notice, *viz.* "Mr. *Hans Peter Schonberg*. As the ſhip *Economy*, which I chartered of you on the 19th *December* 1800, in conſequence of the late embargo laid by the government of *Great Britain* on all *Swediſh* veſſels, could not nor did proceed on her voyage, according to the terms of the ſaid charter-party, whereby the ſame charter-party was terminated and at an end; but as I underſtand it is your intention now to proceed to *St. Michael's*, I hereby give you notice that the ſhip cannot be poſſibly loaded there, the ſeaſon for ſhipping fruit being long ſince paſſed; and your now making ſuch voyage muſt, as you well know, be wholly uſeleſs and nugatory. Dated the 4th day of *July* 1801.

(Signed) "*William Hubbard*."

In the month of *January* 1801, after the ſame embargo had taken place, the Defendant applied to the captain to give back his letters of advice, but he refuſed to deliver them up, and ſaid he would deliver them to the agent for the owners in town. From that time no notification was made by either party that the contract ſhould not be proceeded upon till the captain applied to the Defendant, as before mentioned. The whole freight of the ſhip, under the memorandum for the charter, would have amounted to 748*l.* 2*s.* 6*d.*, but the actual damage the Plaintiffs ſuſtained out of pocket by the expences of ſailing upon the voyage till the ſhip was driven back, by paying the ſailors during the embargo, and by the damages ſuſtained, amounted to the ſum of 397*l.* 6*s.* 6*d.*, for which the verdict was given.

The queſtion for the opinion of the Court was, whether the Plaintiff was entitled to recover either the ſaid ſum of 748*l.* 2*s.* 6*d.* or the ſum of 397*l.* 6*s.* 6*d.* or any part thereof; if not a nonſuit to be entered.

This

1802.

TOUTENG and Another v. HUBBARD.

This case was twice argued; first in *Easter* term last by *Bayley* Serjt., for the Plaintiffs, and *Best* Serjt., for the Defendant; and again in *Trinity* term, by *Shepherd* Serjt., for the former, and *Lens* Serjt., for the latter.

Arguments for the Plaintiffs. The embargo laid upon *Swedish* ships by the government of this country on the 15th of *January* 1801, did not put an end to the contract between the Plaintiffs and the Defendant. When the embargo was taken off, the captain was bound to proceed upon the voyage without demanding any additional freight, and the merchant was bound to employ the ship, and pay the freight stipulated for by the contract. In the present case it was unnecessary that the ship should actually have proceeded upon the voyage to entitle the Plaintiffs to recover, because the Defendant in express terms discharged them from that obligation. It may perhaps be contended that as the object of the voyage was to obtain a cargo of fruit, and it became impossible, in consequence of the embargo, that the ship should arrive at *St. Michael's* until after the fruit season, the Defendant was discharged; but as the delay was not owing to any neglect of the captain, and no time of arrival was stipulated for in the contract, he would be entitled to freight at whatever time he might arrive. The ship might have been prevented from arriving in time by other accidents, as well as by an embargo, such as wind, weather, and detention of pirates, &c. and yet in such case the Defendant must have paid the freight; if therefore it was intended that the consequences of an embargo should have been sustained by the Plaintiff, there should have been an express clause to that effect in the agreement. The case of *Hadley* v. *Clarke*, 8 *T. R.* 259. clearly shews that no terms can be introduced into a contract by implication. In that case the owners of a ship refused to fulfil their contract in consequence of an embargo having for a considerable time prevented the ship proceeding in her voyage. Mr. Justice *Lawrence* there says, "it was incumbent on the Defendants, when they entered into this contract, to specify the terms and conditions on which they would engage to carry the Plaintiff's goods to *Legborn*; they accordingly did express the terms, and absolutely engaged to carry the goods, the dangers of the seas only excepted; that therefore is the only excuse which they can make for not performing the contract; if they had intended that they should be excused for any other cause, they should have in-

troduced such an exception into their contract;" and he cites *Paradine* v. *Jane*, *Alleyne*, 27. in which case it was decided that where a party by his own contract creates a duty and charge upon himself, he is bound to perform it, notwithstanding any accident by inevitable necessity, because he might have provided against it in his contract. Though the case of *Draddy* v. *Deacon*, 2 *Vern.* 242. tends to shew, that an embargo dissolves the contract between the freighter and ship owners, yet it will be sufficient to say that *Draddy* v. *Deacon* was over-ruled in *Hadley* v. *Clarke*. An embargo is an act of precaution, and must be considered merely as a temporary measure, in which respect it differs from an act of hostility; and this distinction is taken *Valin. Comment. tom.* 1. *p.* 626, 627. It does not amount to an interdiction of all commerce; but only to a suspension; and, therefore, the freighter must await the termination of the suspension, and then fulfil his contract. With respect to the exception contained in the agreement of "the restraint of princes and rulers," it was clearly introduced for the benefit of the captain, who was to proceed with all convenient speed, subject to that exception, and cannot therefore be adduced as an excuse for non-performance of that part of the contract, to which it was never intended to apply. On this part of the subject, and indeed upon the whole case, a late opinion of Lord *Kenyon* at *Guildhall*, in a case of *Blight* v. *Page*, is a strong authority (*a*). Nor can it be said, by way of answer to the Plaintiff's claim, that if the freight in this case be paid, the owners of a *Swedish*

(*a*) *Blight and Others* v. *Page*, Sittings at *Guildhall* after *Michaelmas* term 1801, *coram* Lord *Kenyon*.

This was an action upon a memorandum for a charter-party.

By the memorandum it was agreed between the Plaintiffs, who were owners of the ship *Favourite*, and the Defendant, that the said ship, being tight, &c. should with all convenient speed sail and proceed to *Liebau*, or so near thereto as she could safely get, and there load from the factors of the Defendant a full and complete cargo of barley, in bulk not exceeding what the said ship could reasonably stow and carry, over and above her tackle, &c.; and being so loaded should therewith proceed to *Berwick*, or so near thereto as she could safely get, and deliver the same, on being paid freight at and after the rate of 8 *s.* 6 *d.* *per* quarter, with two thirds port charges and pilotage as customary, (restraints of princes and rulers during the said voyage always excepted,) one half of the freight to be paid on unloading and right delivery of the cargo, and the remainder in two months following. Thirty running days to be allowed the said merchant, if the ship was not sooner dispatched, for loading the said ship at *Liebau* and unloading at *Berwick*, and ten days on demurrage over and above the said laying days, at 3 *l.* *per* day.

The *Favourite* sailed on her voyage and proceeded to *Liebau*; but immediately on her arrival in the roads of that place the captain was informed by the factors of the Defendant that the *Russian* Government had prohibited the exportation of barley, and that it was therefore out of their power to furnish the intended cargo. The captain, how-

1802.
TOUTENG and Another v. HUBBARD.

a *Swedish* vessel will be paid for not doing that which they were prevented from doing because they were *Swedes*, and thus obtain an indemnification for the acts of the *British* Government out of the pocket of a *British* merchant; for the case must be decided upon a general rule of law, equally applicable to the present case as to that of a *British* captain detained by an embargo in a port of *Sweden*, after having entered into a contract with a *Swedish* merchant, and suing in this country. Although, upon the above principles, the Plaintiffs may perhaps be entitled to recover the whole freight, amounting to 748*l.* 2*s.* 6*d.*, yet they only insist upon the sum of 397*l.* 6*s.* 6*d.*, being the expences incurred by them in pursuance of a contract which the Defendant has refused to fulfil.

Arguments for the Defendant. It is not necessary to contest any part of the doctrine laid down in *Hadley* v. *Clarke*. In that case there was nothing which required that the contract should be performed within a particular time; but the object of the contract in the present case was, that the Plaintiff's ship should proceed to *St. Michael's* before the next fruit season, and that the Defendant should furnish a cargo of fruit. Although no time for the performance of the contract be expressed, yet the nature of the contract necessarily imposes a limit to the time within which it was to be performed; and the possibility of performing the contract

however, entered the port of *Liebau*, and after continuing there forty-nine days, returned in ballast to *Berwick*.

The action was brought to recover 459*l.* for freight, 27*l.* 18*s.* for charges, and 30*l.* for ten days' demorrage.

The Attorney-General (*Law*) for the Plaintiff insisted, that the exception of the restraints of rulers and princes was only applicable to the owners, and did not therefore excuse the shippers.

Gibbs for the Defendant urged, 1st, that the exception was applicable both to owners and shippers: and, 2d, that as the prohibition of the *Russian* Government equally prevented the captain from sailing with the cargo, as the shippers from loading it on board, the averment in the declaration that the Plaintiffs were ready to perform their part of the contract was not true; and, 3dly, that there was no pretence for demanding demurrage, since it was the fault of the captain himself to remain at *Liebau* after the notice which he had received.

Lord *Kenyon* Ch. J. I am decidedly against the Defendant upon the point of law. It is said in *Co. Litt.* [1] that if a man be bound in an obligation to *A.*, conditioned to enfeoff *B.* a stranger, and *B.* refuse, the obligation is forfeited; for the obligor has taken upon him to make the feoffment. The reason of this is clear. If a man undertakes what he cannot perform, he shall answer for it to the person with whom he undertakes. I am always desirous to apply the settled principles of the law to the regulation of commercial dealings. With respect to the charge for demurrage, as it appears that notice was given before the captain entered the port that the factor could not furnish a cargo, there is no pretence for making the Plaintiffs liable.

Verdict for the Plaintiffs for 486*l.* 18*s.*

[1] p. 209.

within

within that period having been prevented by an act of state, the contract was necessarily put an end to; for where a party is prevented from performing his contract by the interference of the law, he is not responsible to those with whom he contracts. The embargo in this case was not like those in *Hadley* v. *Clarke* and *Blight* v. *Page*, but was in the nature of an act of hostility against the subjects of *Sweden*, and if the *Swedish* captain be allowed to recover damages against the *British* merchant for non-performance of a contract which he was prevented from performing by the act of the *British* state, the object of the state will be defeated, and instead of operating against the subjects of *Sweden* will be turned against the subjects of this country. Indeed the clause which excepts the restraints of rulers and princes, must equally extend to both parties; and if it will excuse the Defendant from not proceeding on the voyage, it will equally excuse the Plaintiff from not furnishing a cargo. In *Molloy, b. 2. c. 4. s. 5.* it is said, "if the ship in her voyage becomes unable without the master's fault, or that the ship be arrested by some prince or state in her voyage, the master may either mend his ship or freight another." Now the *Swedish* ships only being restrained by the embargo laid on in this case, the Plaintiff should, in order to entitle himself to sue the Defendant on his contract, have offered to send some other ship not within the restriction of the embargo. With respect to the case of *Paradine* v. *Jane*, there is a great distinction between that which is done after a man is let into possession and that which prevents his getting possession. If in that case Prince *Rupert* had prevented the lessor from putting the lessee into possession the former could not have recovered rent against the latter without shewing that he had been put into possession. The same principle and distinction may be applied to the case of *Blight* v. *Page*, where the ship having proceeded on her voyage, was prevented from completing it by an embargo in a foreign port, laid on by the Government of that country; but here the ship was prevented from commencing the voyage by the Government of the country where the contract was made. This distinction is expressly laid down in *Abbott's Treatise* on merchant ships and seamen, p. 339, 340. where it is said that if the Government of the country to which the ship and cargo belong should prohibit the exportation of the commodities composing the cargo, the law of that country would give no damages against the merchant; on the other hand, if a merchant hire a ship to go to a foreign port,

 and

1802.

TOUTENG and Another v. HUBBARD.

and covenant to furnish a lading there, a prohibition by the Government of that country to furnish the intended articles neither dissolves the contract nor absolutely excuses a non-performance of it.

Cur. adv. vult.

The opinion of the Court was now delivered by

Lord ALVANLEY Ch. J. The Defendant in this case having expressly dispensed with the Plaintiff's proceeding to *St. Michael's* for the cargo as soon as the embargo was at an end, no question can arise as to the right of the latter to recover in this action on the ground of his not having performed his part of the contract. The only question therefore will be, Whether the Defendant was bound by the terms of the charter-party to furnish a cargo to the Plaintiff, notwithstanding the intervention of the embargo? I will first consider for what purpose and for whose benefit the words "restraint of princes and rulers during the said voyage always excepted" were inserted in the charter-party. It appears to me that they were introduced for the benefit of the master, not of the merchant, and that the true construction of the charter-party is this: the captain engages to go to *St. Michael's*, restraint of princes excepted, and the merchant engages to employ him and furnish the ship with a cargo. Lord *Kenyon*, in the case of *Blight* v. *Page*, put this construction on an instrument nearly similar with the present. If then this had not been the case of a *Swedish* ship hired by an *English* merchant, the merchant would have been under the necessity of furnishing the ship with a cargo if she had arrived at *St. Michael's*, as soon as she conveniently might after the embargo was taken off, although by arriving after the fruit season was over the object of the voyage might be defeated. Such is the doctrine laid down in *Hadley* v. *Clarke* and *Blight* v. *Page*. The ground on which the Court decides this case (though any reasons illustrative of that ground must be considered as my own) is, that a *British* merchant is not liable to answer for any damages which the owner of a foreign vessel may sustain from an embargo laid by the *British* Government on foreign ships in the nature of reprisals and partial hostility. Let us consider the nature of an embargo of this kind. I have no difficulty in subscribing to the doctrine laid down in *Hadley* v. *Clarke*, that a common embargo does not put an end to any contract between the parties, but is to be considered as a temporary suspension of the contract only, and that the parties must submit to whatever inconvenience may arise therefrom, unless

they have provided against it by the terms of their contract. The object of the voyage might equally have been defeated by the act of God as by the act of the state; as if the ship had been weather-bound until the fruit season was over, and yet in that case the merchant would have been bound to fulfil his contract. The principle of *Hadley* v. *Clarke* is this; that an embargo is a circumstance against which it is equally competent to the parties to provide as against the dangers of the seas; and therefore if they do not provide against it they must abide by the consequences of their contract. But is there no distinction between an embargo laid on for general purposes and an embargo in the nature of partial hostilities? By this embargo all *Swedish* vessels in the ports of *England* were detained, and the crews made prisoners. The object of this must have been to make a species of reprisal on the state of *Sweden*; which we sitting here, and every good *British* subject, must consider as an act justified by the conduct of the Court of *Sweden* towards this country. If such an embargo had been laid on by a foreign prince, though in the nature of hostility, I desire not to be understood as giving any opinion whether in such case the contract would have been defeated or merely suspended, though I certainly have an opinion upon the subject. The ground of our determination is not merely that the embargo partook of the nature of hostility, but that it was in the nature of hostility by the Government of *Great Britain*, of which the merchant is a subject, where the charter-party was entered into, and in the Courts of which the *Swedish* captain now seeks compensation. Taking the case of *Hadley* v. *Clarke* to have gone all the length which I have stated, this great question remains to be decided, Whether a *British* subject shall be compelled to indemnify a *Swede* against all the acts of the *British* Government which have been done to the latter with a view to resist the injustice of the *Swedish* Court; and whether by a charter-party of affreightment it shall be competent to a foreigner to defeat all the effects of the *British* embargo, and throw the burthen upon a *British* subject? We are of opinion that, on principles already established, it would be a total violation of every rule by which the Courts have been governed respecting actions brought against *British* subjects by persons in a more or less extensive degree of hostility, to suffer this Plaintiff to recover. Whatever opinions may formerly have been entertained, it must now be taken as a decided point that an insurance upon enemies' property

1802.
TOUTENG and Another v. HUBBARD.

1802. TOUTENG and Another v. HUBBARD.

property is illegal; and this Court has determined that, though at the time of the insurance the assured belonged to a state in amity with this country, yet that the policy does not cover a loss arising from a capture made by a *British* cruizer in consequence of a war having broken out between this country and the state of which the assured is a subject (*a*). Let us next consider whether an insurance, for the benefit of a foreigner, against the effects of a *British* embargo, such as this, would be legal. In the case of *Rotch* v. *Edie* (*b*), the Court expressly declined giving any opinion upon the point. We are now called upon to give an opinion. I have no difficulty in saying, and my Brothers concur with me in thinking, that it would be illegal. What is the effect of such an insurance? It is to rescue the foreigner from those evils which it is the object of the *British* Government to inflict. If the King could not lay such an embargo without affecting his own subjects, he would not lay it at all; and the policy of the state would be defeated. I do not mean, however, to intimate that the *British* merchant might have maintained an action against the *Swede* for not proceeding on the voyage notwithstanding the intervention of this embargo. It might be a very sufficient answer for the latter to say that he only engaged to sail if not detained by the restraint of princes, and that the exception included the *British* Government. It might perhaps be urged, that the same principle which exempts the *British* merchant from the consequence of the acts of the *British* Government will prevent the *Swede* from taking advantage of them; but it might be going too far to hold that the acts of the *British* Government should not only deprive the *Swede* of the the benefit of what he might have earned, but make him liable in damages for the omission of that which he was prevented from doing. The case of *Paradine* v. *Jane*, *Aleyn*, 26. which was cited by Mr. Justice *Lawrence* in *Hadley* v. *Clarke*, appears to me to be founded on much good sense. The third resolution is, that "where the law creates a duty or charge, and the party is disabled to perform it without any act in him, and hath no remedy over, there the law will excuse him; but where a party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." There

(*a*) Vide *Furtado* v. *Rodgers*, *ante*, p. 191.

(*b*) 6 *T. R.* 413.

is also a case of *Williams* v. *Lloyd*, Sir *Wm. Jones*, 179. where the Defendant, who had agreed to re-deliver a horse upon request, which had been lent to him, was held to be excused, because the horse had died before any request made. The principle established by these cases appears to be this; that if a party contract to do any thing, he shall be bound to the performance of his contract, if from the nature of that contract it is capable of being performed, and legally may be performed. But where the policy of the state intervenes and prevents the performance of the contract, the party will be excused; and so if a party who has covenanted not to do something is directed by act of parliament to do that very thing, he is released from his covenant; *Brewster* v. *Kitchin*, 1 *Ld. Raym.* 321. where Lord *Holt* says, "the difference where an act of parliament will amount to a repeal of a covenant and where not, is this; where a man covenants not to do a thing which it was lawful for him to do, and an act of parliament comes after and compels him to do it, there the act repeals the covenant, and *vice versâ*, *Dyer*, 27. *pl.* 178. 186, 7, 8.; but where a man covenants not to do a thing which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant, *Dyer*, 48. *pl.* 5." The point now in dispute is reported by Mr. *Park* to have arisen in *Bischoff* v. *Agar* (a), but case went off upon another ground, and no opinion was given upon the question, Whether an embargo be a risk within the policy or not? My Brother *Marshall*, in his treatise, p. 437. says, "if a *British* ship be arrested or seized by the authority of the *British* Government from state necessity, this shall be a detention within the meaning of the policy for which the insurer is liable." When we find an opinion in a text writer upon any particular point, we must consider it not merely as the private opinion of the author, but as the supposed result of the authorities to which he refers. The authorities there cited are *Emerigon*, vol. 1. p. 541. and *Valin*, vol. 2. p. 134. It does not appear to me that those two authors warrant the opinion adopted, at least to the extent to which it is adopted; but that it is rather deduced from an opinion thrown out by Lord *Holt* in *Green* v. *Young*, 2 *Ld. Raym.* 840. where it being a question whether an embargo laid on by the *British* Government would excuse the insurers, Lord *Holt* "seemed to incline

(a) p. 81. 5 edit.

that

1802.

TOUTENG, and Another v. HUBBARD.

that it would not, and that this was within detention of princes, &c.;" but he gave no absolute opinion, because the case was referred. That, however, appears to have been a question arising between two *British* subjects, with respect to which I desire to be understood as giving no opinion. Perhaps there may be no great reason why one *British* subject should not insure another against the effects of an embargo laid on by the *British* Government; the policy of the state is not concerned in preventing such an insurance. But the case is very different where the embargo is laid on by way of hostility and reprisal against foreign subjects. All the cases admit that where a party has been disabled from performing his contract by his own default, it is not competent to him to allege the circumstances by which he was prevented as an excuse for his omission. May not the loss which the present Plaintiff has sustained be considered in a political point of view, as arising from his own default? He undertook to proceed with all convenient speed, and if he had loitered it would have been an answer to this action. Then must not every subject of the *Swedish* state be answerable for what we must consider as an act of aggression on the part of his sovereign? Perhaps if the embargo had been laid on by a third state, it might only have produced a suspension of the contract, upon the principle that the impossibility of proceeding had not arisen from the default of the *Swedish* captain. But here the impossibility has arisen from an act of the *British* state, to which all his Majesty's subjects are parties, occasioned by an act of the *Swedish* court, to which all the subjects of *Sweden* are parties.

Per Curiam, Judgment of Nonsuit.

Nov. 29th.

FRONTINE *v.* FROST.

A seaman who quits his ship after her arrival in port, but before she is moored, does not thereby subject himself to the forfeiture of his whole wages under the 2 Geo. 2. c. 36. s. 3. To entitle the master to deduct a month's wages for the benefit of *Greenwich* Hospital under the 2 G. 2. c. 36. s. 8 & 9. it is incumbent on him to shew that the seaman quitted the ship without leave in writing. And such a deduction cannot be set off by the master in an action for wages by the seaman, unless the master has previously debited himself to *Greenwich* Hospital for the amount in a book kept according to the direction of the statute.

INDEBITATUS assumpsit for seaman's wages. The Defendant pleaded the general issue, and gave a notice of set-off.

The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* sittings in this term, when it appeared that the Plaintiff was a car-

penter

penter, and entered into articles at *Martinique*, to serve on board the ship *Progress*, of which the Defendant was master, on her homeward voyage; that on the arrival of the ship in the port where she was to have been moored, but before she was actually moored, the Plaintiff, together with most of the other seamen, the ship being under the command of the mate, went on shore and never afterwards returned; but to shew whether he had or had not obtained permission to quit the ship, either in writing or otherwise, no evidence was offered. On the part of the Defendant it was contended that the Plaintiff, by deserting from the ship before she was actually moored, had forfeited his whole wages, under 2 *Geo.* 2. *c.* 36. *s.* 3., or at least that he had forfeited a month's wages to *Greenwich* hospital, by absenting himself without leave in writing, which sum the Defendant was entitled to set-off, he being obliged to debit himself to *Greenwich* hospital for the amount, under the 2 *Geo.* 2. *c.* 36. *s.* 6. & 9. The jury, under his lordship's direction, found a verdict for the Plaintiff, subject to the opinion of the Court upon both points.

Accordingly a rule *n. si* having been obtained on a former day for setting aside or reducing this verdict,

Cockell Serjt. now shewed cause; first, as the Plaintiff quitted the ship in company with the rest of the seamen, and no objection appears to have been made to his so doing, it is not to be presumed that he quitted her without leave; and indeed the jury, by their verdict, have negatived the fact of desertion. If he absented himself without leave in the pool, still that will not amount to a desertion, by which his whole wages will be forfeited, such forfeiture being only incurred under 2 *Geo.* 2. *c.* 36. *s.* 3. by desertion in parts beyond the seas. 2dly, The 2 *Geo.* 2. *c.* 36. *s.* 6. directs, that in case any seaman shall leave the ship before he has obtained a discharge in writing from the master or commander or other person having charge of the ship, he shall forfeit one month's pay, to be recovered, applied, and disposed of as thereinafter directed; and the 9th section authorises the master, commander, or owners, to deduct out of any seaman's wages all the penalties and forfeitures incurred by the act, and to enter them in a book, which book is to be signed by the master or commander and two principal officers of the ship, setting forth that the penalties and forfeitures contained in such book are the whole penalties and forfeitures stopped during the voyage, which penalties and forfeitures, except the forfeiture for

1802. FRONTINE *v.* FROST.

for desertion, shall go to *Greenwich* hospital, and be paid and accounted for by the master or commander to the officer who collects the sixpence *per* month. The offence by which the forfeiture of a month's wages is incurred is leaving the ship without a discharge in writing; it was incumbent therefore on the Defendant to shew that he had quitted the ship without such discharge, which might have been done by calling some of the officers of the ship; but at all events before the master could take advantage of this forfeiture he was bound to shew that he had himself complied with all the requisites of the statute, by producing a book containing an entry of the forfeiture, and signed in the manner directed by the statute.

Shepherd and *Vaughan* Serjts. in support of the rule. The articles entered into in pursuance of the statute provide, "that 24 hours absence without leave shall be deemed a total desertion, and render the seamen and mariners liable to the forfeitures and penalties contained in the acts therein recited," which are 2 *Geo.* 2. *c.* 36. and 37 *Geo.* 3. *c.* 73. This must relate to absence during the voyage, which is not at an end until the ship is moored and her cargo delivered. It is supposed, however, that the forfeiture of the whole wages must be confined to desertion in foreign ports; but can it be supposed that if a seaman desert in the *British* channel, or between *Orford Ness* and the *North Foreland*, which is the most dangerous part of the whole navigation, he shall only be subject to the forfeiture of a month's wages? By the articles every seaman agrees to do his duty, and not to go on shore without leave "till the voyage is ended, and the ship discharged of her cargo," and in default thereof to be subject to the penalties of the 2 *Geo.* 2. *c.* 36. and that 24 hours absence without leave shall be deemed a desertion. The Plaintiff therefore having gone on shore without leave before the discharge of the cargo, and never having returned, is by the articles rendered liable to the penalty for desertion contained in the 2 *Geo.* 2. The articles further provide, that no seaman shall be entitled to his wages, or any part thereof, until the arrival of the ship at the port of discharge, and her cargo delivered; which is in the nature of a condition precedent. *Cutter* v. *Powell*, 6 *T. R.* 320. The Defendant having proved that the Plaintiff quitted the ship, it was incumbent on the latter to prove that he had obtained leave, which is a positive fact; for it is contrary to the rule of law to require proof of a negative.

The

The jury therefore have found a verdict unsupported by evidence. It cannot be contended that the sixth section of 2 *Geo.* 2. *c.* 36. which subjects the seaman to the forfeiture of a month's wages for leaving the ship without a discharge in writing, operates to destroy the effect of a forfeiture for desertion before the ship has been moored; since the forfeiture created by that section is confined, as appears by the preamble, to quitting the ship "after her arrival at her unlivering port," and before she is unladen. 2dly, It was not possible for the defendant to prove the want of leave in writing; for if a party absent himself clandestinely, without first demanding permission, no refusal can be proved. It is sufficient to shew that he was absent to throw the *onus* on him of proving a discharge in writing. If then the Plaintiff absented himself without leave in writing he incurred the penalty imposed by the act, for which the Defendant is bound to account to *Greenwich* Hospital; and it is no answer to say that the Defendant has neglected to comply with some of the regulations of the act, since the statute has imposed a penalty upon him if he does not render an account.

1802.

FRONTINE *v.* FROST.

Lord ALVANLEY Ch. J. An attempt has been made to put a new construction on the articles in this case, which are in the usual printed form (*a*). Those articles provide that 24 hours absence without leave shall be deemed a total desertion, and render every seaman liable to the forfeitures and penalties in the 2 *Geo.* 2. *c.* 36. and the 37 *Geo.* 3. *c.* 73. But this clause of the articles cannot be supposed to render seamen liable to the penalty imposed by those acts for desertion in cases to which the acts themselves do not apply. Now it is clear that the intention of the legislature in inflicting a forfeiture of the seaman's whole wages for desertion by 2 *Geo.* 2. *c.* 36. *s.* 3. was confined to the case of his refusing to proceed on the voyage, or quitting the ship abroad, by which the master might be exposed to the necessity of hiring another person to supply his place at an exorbitant rate of wages. It is provided by the fifth section, that if any seaman shall absent himself without leave from the commanding officer, he shall forfeit two days' pay to the use of *Greenwich* Hospital. The meaning of these two sections is, that if the sailor run away before the voyage is commenced, or in ports beyond the seas, he shall forfeit his whole

(*a*) See the Schedule to 37 *Geo.* 3. *c.* 73.

wages;

1802.
FRONTINE
v.
FROST.

wages; if he absent himself during the voyage and return, he shall forfeit two days' pay. It having been found, however, that seamen were in the habit of quitting the ship after her arrival at the port of delivery, and before the ship was unladen, a clause was introduced authorising the master to deduct a month's wages where any seaman was guilty of such offence. And, to prevent persons from setting up a pretended permission, it was provided that the permission should be in writing. But if the master make this deduction, he should immediately make an entry to that effect in a book to be kept for that purpose; which book must be signed by himself and two principal officers of the ship. Unless this be complied with, I do not see how the master is to avail himself of the deduction by way of set-off in an action for the wages. The next question is, Whether the case were properly left to the jury upon the evidence? In cases of forfeiture, the best evidence of which the nature of the case admits ought to be given by the party who insists upon the forfeiture. It is said, however, that a negative cannot be proved; but there are many cases in which it may, and in this case it might have been shewn that the mate, who at the time had the command of the ship, had not given a discharge. It appeared indeed that the Defendant went away at the same time with most of the other seamen at a period when he might or might not be wanted, and when the seamen commonly have leave to go on shore. I think, therefore, that there was a fair ground for the jury to infer that the absence was not without permission.

ROOKE J. (a) I am of opinion that the case was properly left to the jury. The Plaintiff proved service on board the ship up to the time of her arrival at the place where she was to be moored; the Defendant insists upon a forfeiture of the wages, upon the ground of the Plaintiff having deserted the ship; but where a party claims under a forfeiture he is bound to make out his case precisely. It will be extremely hard upon seamen under similar circumstances with the present Plaintiff, if they are expected to prove an absence with permission in order to answer a forfeiture which they have no previous notice that the master means to set up against their demand. The next question is, Whether the Defendant was entitled to deduct a month's pay on account of the Plaintiff having left the ship at the port of delivery without a dis-

(a) Mr. Justice *Heath* was absent.

4 charge?

charge? To entitle him to make this deduction, he was bound to keep a book and to make an entry of the intended deduction, and to procure the signature of the two chief officers on board; had he done so, there would have been strong evidence of the Plaintiff having quitted the ship without leave. If the Defendant be under the circumstances of this case liable to *Greenwich* Hospital for the deduction, he must take the consequences of his own neglect.

Chambre J. If the jury have found properly that the Plaintiff never deserted without leave, that finding disposes of the whole case. It is insisted that it is incumbent on the Plaintiff to prove that he had leave in writing; but the Defendant, who claims a forfeiture, must shew that the forfeiture has really been incurred; and as absence with leave will not subject the seaman to the forfeiture, the Defendant must give some evidence to prove that the absence was of that kind which entitles him to make the defence to which he now resorts. Indeed there are other cases where a negative must be proved (*a*), as in convictions on the game laws, for destroying game not being duly qualified, where slight evidence of the want of qualification is required (*b*). Had the master been the only person capable of proving the negative in this case, inferior evidence might have been sufficient to repel the presumption in the Plaintiff's favour; but it appears that the mate had the charge of the ship at the time when the Plaintiff left it, and he might have been called to negative the Plaintiff's having been absent with leave. Under these circumstances I think the jury were well warranted in presuming that he had leave. An attempt has been made to put a false construction on the act of parliament and the articles. For the purposes of a general forfeiture, the voyage must be considered at an end when the ship arrives at the port of delivery. If there be any ambiguity in the 3d section of the act, which inflicts a forfeiture of the whole wages for desertion, it is explained by the language of the

(*a*) Where the negative charged consists of a criminal neglect of duty, the law presumes the affirmative, and throws the proof of the negative on the party who makes the charge. *Williams* v. *The East India Company*, 2 *East*. 192.

(*b*) See *Rex* v. *Jarvis* and the other cases cited in *Rex* v *Stone*, 1 *East*. 639. In *Rex* v. *Stone*, indeed, the Judges of the Court of King's Bench were equally divided upon this very point. It seems, however, in that case to have been admitted, that negative proof is not required in actions upon the game laws for penalties: but that in such actions the Defendant may be presumed to be *not duly qualified*, and therefore to have offended against the statute law of the land, unless he proves the contrary by shewing his qualification.

1802.
FRONTINE v. FROST.

the 6th section, which authorises the master to deduct two months' wages from any sailor who shall quit the ship without a discharge in writing after her arrival at the port of delivery. We cannot put a reasonable construction on this act without supposing it to have different views in these two clauses. It is argued that because the sailors agree by the articles to do their duty and not to go on shore "till the voyage is ended and the ship discharged of her cargo," without leave of the master, and in default thereof to be liable to the penalties of the act, the Plaintiff is liable to the penalty of desertion for having quitted the ship before the cargo was unladen. But the articles seem to consider the end of the voyage and the discharge of the cargo as distinct things; and if the voyage was at an end upon the arrival of the ship at the port of delivery, this defence cannot be sustained. With respect to the latter part of the articles, which is supposed to make the arrival of the ship at the port of discharge and the delivery of the cargo a condition precedent, there is nothing to warrant that construction; and we are not called upon to strain a point in favour of this defence.

Rule discharged.

Nov. 20th

HURRY and Others, *v.* The ROYAL EXCHANGE ASSURANCE COMPANY.

A partial loss on a policy on goods by reason of sea-damage, is to be calculated by ascertaining the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds.

THIS was an action on two policies of insurance upon hemp, the one for 4500*l.* to return 2*l per cent* for sailing with convoy and arriving, and the other for 1400*l.* to return 3*l per cent.* for sailing with convoy and arriving.

At the trial before Lord *Eldon* Ch. J., at the sittings after *Hilary* term 1801, a verdict was found for the Plaintiffs, subject to the opinion of the Court as to the amount of the damages on the following case.

The ship sailed with convoy and arrived, upon which the Plaintiffs are entitled to 132*l.* for a return of premium; but in the course of the voyage the hemp was damaged by one of the perils insured against. The invoice price of the hemp, including the premiums of insurance, and all insurable interest at the time, was 5,997*l.* 2*s.* *d.* Had it not met with damage, the gross produce would have been 7,799*l.* 11*s.* 1*d.*; but being damaged, the gross produce was only 5,999*l.* 14*s.* 4*d.*, making a difference of 1799*l.* 16*s.* 9*d.* The

1802.
Hurry and Others v. The Royal Exchange Assurance Company.

net [illegible]ice, after deducting the charges for freight, duties, and other expences, would have been 5,809*l.* 1*s.* 11*d.*; but in consequence of the damage, the gross produce was only 5,999*l.* 14*s.* 4*d.* and the net produce only 3942*l.* 3*s.* 11*d.* The insurance was only upon 5,900*l.* The Plaintiffs contend that the average loss ought to be computed in one of the three following ways; 1st, according to the difference between what would have been the net produce had there been no damage, and the actual net produce (which is 1866*l.* 18*s.*, being 32*l.* 2*s.* 9*d.* *per cent.*) 2dly, By a *per* centage on the invoice price upon the loss of 1866*l.* 18*s.*; or 3dly, By a *per* centage on the sum insured upon the loss of 1866*l.* 18*s.* The Defendants on the other hand contend, that the loss ought to be computed by charging upon the invoice price such a proportion of the difference between the sound and damaged prices at the port of delivery as the invoice value bears to such sound price, *viz* That as the sound price of 7799*l.* 11*s.* 1*d* had sustained a loss of 1,799*l.* 16*s.* 9*d*, the invoice price of 5997*l.* 2*s.* 1*d.* will sustain a loss of 1,384*l.* 10*s.* If the Court shall be of opinion that the Plaintiffs are entitled to the difference between what would have been the net produce had there been no damage, and the actual net produce, the verdict (after deducting freight, duties, and charges) is to be entered for 2,028*l.* 2*s.*, that is to say, for 1,896*l.* 2*s.* (being 32*l.* 2*s.* 9*d.* *per cent.* on the sum insured) in addition to the 132*l.* for return of premiums for sailing with convoy and arriving; but if according to the principle contended for by the Defendants, then for 1,516*l.* 10*s.*, that is to say, for 1,384*l.* 10*s.* and the 132*l.*

This case was argued in *Easter* term last by *Bayley* Serjt. for the Plaintiffs, and *Best* Serjeant for the Defendants, after which it stood over till this day for the consideration of the Court.

And now Lord ALVANLEY Ch. J. said—My Brothers and myself are of opinion that the rule laid down in the late case of *Johnson* v. *Sheddon*, 2 *East.* 581. is the proper rule, and that the loss must in this, as in the case alluded to, be calculated upon the gross proceeds of the goods insured. If I were to enter into the reasons upon which our judgment is formed, I should only repeat the arguments which have been already stated by Mr. Justice *Lawrence*, and in vain comment upon a subject which cannot be better illustrated than it has been by him.

Per Curiam, Verdict to be entered for 1,516*l.* 10*s.*

1802.

REGULA GENERALIS.

It is ordered, That from and after the laſt day of this term, no judgment be ſigned upon any warrant authoriſing any attorney to confeſs judgment without ſuch warrant being delivered to and filed by the clerk of the docquets, who is hereby ordered to file the ſame in the order in which they ſhall be received.

And it is further ordered, That every attorney of this Court who ſhall prepare any warrant of attorney to confeſs any judgment which is to be ſubject to any defeazance, do cauſe ſuch defeazance to be written on the ſame paper or parchment on which the warrant of attorney ſhall be written, or cauſe a memorandum in writing to be made on ſuch warrant, containing the ſubſtance and effect of ſuch defeazance.

ALVANLEY.
J. HEATH.
G. ROOKE.
A. CHAMBRE.

END OF MICHAELMAS TERM.

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Forty-third Year of the Reign of GEORGE III.

1803.

The KING *v.* BENJAMIN POOLEY.

It feems that it is not a felony within the 7 *Geo.* 3. *c.* 50 *f.* 1 for a perfon employed in the poft-office to fteal out of a letter entrufted to his care, a draft on a *London* banker, purporting to be drawn in *London*, but actually drawn above 10 miles from *London*, on unftamped paper. It feems alfo that *f.* 2 of the fame act does not apply to perfons employed in the poft-office; and that a perfon of that defcription therefore, who fteals a letter out of the poft-office, is not guilty of felony under that fection.

THE prifoner was tried at the *Old Bailey September* Seffion 1800, before *Chambre* J. upon an indictment founded on the 7 *Geo.* 3. *c.* 50 *f.* 1. (*a*), for that he, "at the time of the committing of

(*a*) That fection provides that if any deputy, clerk, agent, letter-carrier, poft-boy, or rider, or any other officer or perfon whatfoever, employed in receiving, ftamping, *&c.* letters or packets, or in any other bufinefs relating to the poft-office, fhall fecrete, embezzle, or deftroy any letter, packet, bag, or mail of letters, which he fhall be entrufted with, or which fhall have come to his hands or poffeffion, containing any bank-note, bank poft bill, bill of exchange, &c. banker's letter of credit or note for or relating to the payment of money or other bond or warrant, draft, bill, or promiffory note whatfoever, for the payment of money, or fhall fteal or take out of any letter or packet which fhall come to his poffeffion, any bank-note, &c. (as before), he fhall be guilty of felony without benefit of clergy.

1785. The King v. Pooley. of the several felonies and offences thereinafter mentioned, wa person employed in certain business relating to the post-office; that is to say, in sorting letters and packets brought and conveyed by the post to the General Post-office, situate in *London* aforesaid, to wit, at, &c.; and that on, &c. a certain letter then lately before brought and conveyed by the post, to wit, by the post from *Maidstone* in the county of *Kent* to the General Post-office, for and to be delivered to a certain person at *Mile End* near *London*, that is to say, one *Archibald Thomson*, and then containing therein a certain draft for the payment of money, bearing date at, &c. (stating the draft) whereby the last mentioned persons (the drawers) were required to pay to Mr. *Archibald Thomson* or bearer 200*l.*, and also a certain other draft for the payment of money, to wit, of the sum of 200*l.*, came to the hands and possession of the said *B. Pooley*, then and there being such person so employed as aforesaid in the business of his said employment; and that he afterwards, to wit, on, &c. at, &c. being then and there such person so employed as aforesaid, and then and there having the said letters containing the said drafts in the hands and possession of him the said *B. Pooley* as such person so employed as aforesaid, feloniously did secrete the said letter, then containing the said drafts (the said drafts then and there being in force, and being the property of *D. T.* (the drawer), and the sums of money made payable and secured thereby respectively then and there being unsatisfied,) *contrà formam statuti,*" &c. The 2d count described it as being "a packet." The 3d and 4th counts were the same as the 1st and 2d, only laying it to be the property of *Archibald Thomson* the payee. There were also four other counts, varied like the two first, charging him with "stealing and taking from and out of the said letter the said drafts."

The draft was directed to the *Stratford Place* Banking-house in *Marybone*, and was dated at *London;* but at the trial it was proved to have been drawn at *Teston* near *Maidstone* in *Kent*, above ten miles from the Banking-house. And thereupon an objection was taken by the prisoner's counsel, that as the draft contained in the letter was drawn upon unstamped paper (*a*), it was not a valid order for payment of money, and therefore not within the statute.

(*a*) See 31 *Geo.* 3. *c.* 25. *s.* 4. which confines the exception in favour of bankers' drafts to such as are drawn upon any banker residing within ten miles of the place where the draft is drawn.

This point having been reserved for the opinion of the twelve Judges, was argued before them on the 21st of *November* 1800 in the Exchequer-chamber.

Knowlys for the prisoner. The objections in this case are two; 1st, That the draft in question is not a draft within the meaning of the 7 *Geo.* 3. *c.* 50. 2dly, That this indictment is not proved. A draft for the payment of money within the meaning of the statute must be such a draft that the person in whose favour it is drawn may compel the payment of the money mentioned therein by action; whereas the draft in this case was altogether ineffectual at law. In *R.* v. *Moffatt*, 2 *Leach*, *C. C.* 483. it was decided that forgery could not be committed of a bill of exchange drawn for a less sum and in a different form than that required by 17 *Geo.* 3. *c.* 30.; and in *Mary Mitchell's* case, *Fost.* 119. the prisoner having forged an order to a tradesman for delivery of goods in the name of an overseer of a parish *requesting* him to let the prisoner have the goods and he would see them paid for, the Judges held it not within 7 *Geo.* 2. *c.* 22., which makes it felony to forge any warrant or order for delivery of goods, the terms used not being strong enough to amount to a warrant or order. That determination has since been expressly recognized in *R.* v. *Williams*, 1 *Leach C. C.* 134. So in *R.* v. *Clinch*, 2 *Leach C. C.* 611. it was decided that the order must be directed to the person who is in possession of the goods, and must import that the person whose name is charged to be forged had authority to make it. The same doctrine was laid down in *R.* v. *Ellor*, 1 *Leach C. C.* 363., with respect to the forgery of orders for the payment of money under 7 *Geo.* 2. *viz.* that the terms of the order must be positive. In all these cases the Judges have construed the act by which a new felony was created in the strictest manner, not regarding whether the cases were within the mischief guarded against by the legislature, if not within the true construction of the letter of the act. Now by the 7 *Geo.* 3. *c.* 50. a new felony was created, and the words used as applicable to this indictment are "draft for the payment of money." It was on account of the value of these instruments, and their negotiability, that the legislature considered the offence in so serious a light, and punished it with death. But the 31 *Geo.* 3. *c.* 25 having imposed a particular stamp upon them, and declared them not to be available either in law or equity without that stamp, the draft taken out of the letter by the prisoner had

1803. The King v. Pooley.

had neither value nor negotiability; and though it imports to be payable on demand, yet the holder could not have compelled that payment. In the next place, the indictment has alleged that the draft in question was *in force* at the time it was taken; whereas, from the want of a stamp, it never was, from the time of its creation to that of its being taken by the prisoner, in any way available.

Abbott on the part of the crown. It is not necessary to support with proof the allegation that the draft was *in force*, but it may be rejected as surplusage. In *Peppin* v. *Solomons*, 5 *T. R.* 498. the rule is laid down by *Buller* J. as to proving allegations when made, and confined by him to descriptions of contracts and records. Indeed in *R.* v. *Jenks*, 2 *Leach C. C.* 896. where the prisoner was indicted for a burglary in the house of *A.* with intent to steal the goods of *B.*, though no such person as *B.* lived in the house, or had any property there, the latter allegation was held immaterial. With respect to the 1st objection, though the draft in question could not have been received in evidence for the purpose of compelling payment of it, yet it may be received in evidence to convict the prisoner of the offence with which he is charged. In *R.* v. *Hawkeswood*, 1 *Leach C. C.* 292. it was held that a bill of exchange not stamped might be received in evidence to support an indictment for forgery; and in *R.* v. *Colin Reculist*, 2 *Leach C. C.* 811. an unstamped promissory note was received in evidence to convict the prisoner of uttering the same. In that case *Grose* J. in delivering the opinion of the Judges, says, "the proposition arising from the objection is, that the paper writing stated in the indictment is not a promissory note, because it is not on a stamp; but the question, whether it is or is not a promissory note, depends upon the tenor of the instrument, and not upon the circumstance of its being stamped or not." The determination in *R.* v. *Moffat* proceeded on the words of the 17 *Geo.* 3. *c.* 30. which had declared such a bill of exchange as was forged in that case *void.* But the 31 *Geo.* 3. *c.* 25. does not declare the instruments there enumerated void if not stamped, but that they shall not "be pleaded or given in evidence in any court, or admitted in any court to be useful or available in law or equity as an acknowledgment of any debt," &c. &c. The draft in this case could not have been enforced, being unstamped, but it did not appear upon the face of it to require a stamp, since it did not purport to be drawn above ten

miles from *London*. The object of the legislature was to prevent the property of persons conveyed by the post from being stolen. [Lord *Eldon* C. J. The legislature has not made it a felony to secrete any letter, but to secrete any letter containing such valuables as are there enumerated.]

1803. The King v. Podley.

The opinion of the Judges was never publicly communicated, but a pardon was granted to the prisoner for the specific offence charged upon him by the indictment, in order that he might be indicted upon the 2d section of the statute 7 *Geo.* 3. *c.* 50.

Accordingly the prisoner was again tried at the *Old Bailey* Sessions in *February* 1801, by *Lawrence* J., on an indictment framed on the 2d section (*a*) of the 7 *Geo.* 3. *c.* 50. for that he "feloniously did steal and take from and out of a certain post-office, to wit, the chief Penny-post Office situate, standing, and being in, &c. one letter, theretofore sent by the post to the said post-office for and to be delivered to a certain person at *Mile End* near *London*, that is to say, one *Archibald Thomson*, and one other letter, *contrà formam statuti*," &c. The 2d count was for stealing "out of a certain house for the receipt and delivery of letters sent by the post, situate," &c. and the 3d, "out of a certain place for the receipt," &c. There were three other counts, only varying from the first by charging him with stealing "one packet theretofore sent by the post."

It appeared in evidence that the prisoner was employed in the penny-post department as a charge-taker and as a letter-carrier, and that as charge-taker the letters arriving by the General Post, which were to be delivered by the carriers of the Penny-post of the eastern division, were delivered to him to be divided according to the different walks of the letter-carriers, and that he did not deliver the letter the subject of the indictment to the letter-carrier within whose walk the person lived to whom it was directed; that he afterwards opened it, and took out of it a check or draft for

(*a*) That section provides, "that if any person whatsoever shall rob any mail of any letter or packet, bag, or mail of letters, or shall steal and take from or out of any such mail, or from or out of any bag of letters sent or conveyed by the post, or from or out of any post-office or house or place for the receipt or delivery of letters or packets sent or to be sent by the post, any letter or packet, he shall be guilty of felony without benefit of clergy, although such robbery, stealing, or taking shall not appear to be taking from the person, or on the high-way, or in any dwelling-house, &c. and although it should not appear that any person was put in fear."

200 *l.*

1803. The King v. Pooley.

200 *l.* on the *Stratford Place* Bank, drawn on unſtamped paper by a perſon living above 30 miles from *Stratford Place.* *

It was objected for the priſoner that this draft being on unſtamped paper could not be received in evidence as a medium to ſhew that the priſoner had ſtolen the letter. But the Court overruled the objection, being of opinion that the draft, though unſtamped, might be received in evidence for collateral purpoſes, though not for the purpoſe of recovering the money contained in it. But the Court entertained doubts whether the 2d ſection of the 7 *Geo.* 3. *c.* 50. applied to ſervants of the poſt-office, againſt whoſe miſconduct the firſt ſection of that act was intended to guard, and from which it may be inferred that the legiſlature did not conceive that the embezzling a letter by theſe ſervants was a larceny.

The caſe was argued before the Judges (*abſente* Lord *Eldon* C. J.) on *Saturday* the 2d of *May* 1801.

Knapp for the priſoner. This indictment is framed on the 2d ſection of the 7 *Geo.* 3. *c.* 50., and it will be neceſſary for me to contend that this ſection does not extend to the priſoner, becauſe he was a perſon employed in the poſt-office as a charge-taker and letter-carrier. In the conſtruction of penal ſtatutes all the clauſes in the ſame ſtatute, and all the ſtatutes *in pari materiâ* muſt be taken together. In the 5 *Geo.* 3. *c.* 25. *ſ.* 17. 19. & 20. proviſions ſimilar to thoſe contained in the two firſt ſections of the 7 *Geo.* 3. *c.* 50. are confined to perſons employed in the poſt-office: and the third ſection of the 7 *Geo.* 3. again takes notice of perſons employed in the poſt-office, and provides againſt their deſtroying any letter for which they have received the poſtage. The words, therefore, " any perſon or perſons whatſoever," contained in the 2d ſection of the 7 *Geo.* 3., can only be conſtrued to extend to perſons not employed in the poſt-office. In *Rex* v. *Skutt*, *Leach's Crown Caſ.* 124. ed. 3., it was doubted whether an embezzlement by a ſervant would amount to larceny; and indeed the 39 *Geo.* 3. *c.* 85., which was made to protect maſters againſt embezzlements by their clerks or ſervants, was paſſed on a doubt ſuppoſed to be entertained by the Judges in *Rex* v. *Bazeley*, *Leach's Crown Caſ.* 973. ed. 3. whether the priſoner, being employed as a ſervant, was guilty of a larceny in embezzling money delivered to him for his maſter. Now in this caſe the priſoner had a poſſeſſion by delivery to him as a ſervant, and he is

 not

1803.
The King v. Pooley.

not charged with embezzling but with stealing. [*Heath* J. There never was any doubt amongst the Judges in *Bazeley's* case whether a servant, as such, might not be guilty of larceny; but the difficulty there, and upon which the decision proceeded, was, that the money being paid to the servant for the master, was taken by the former before it ever came to the possession of the latter by being put into the till.] In *Rex* v. *Waite*, *Leach's Crown Cas.* 33. ed. 3. it was determined not to be felony in a cashier of the Bank to embezzle an *India* bond. The report of *Skutt's* case is very inaccurate: for it appears upon inquiry that the words "being a person employed in the General Post-office" were not inserted in the indictment, as stated in the report; but that the indictment was general, "for that he did steal and take from the General Post-office one letter, &c. against the form of the statute:" and in some of the counts of the indictment there was an averment that the said letter was of the value of 5*s.* 3*d.* That case, therefore, is precisely similar to the present; since the indictment was founded on the 2d section of the 7 *Geo.* 3. *c.* 50.: and it appearing in evidence that the prisoner, at the time when the offence was committed, was a sorter of letters in the post-office, it was objected that the case was not within the act, to which the Court assented. In this case indeed, the letter not having been alleged to be of any value or the property of any person, the offence charged does not amount to stealing: for according to the doctrine of *The King* v. *Phipoe*, 2 *Leach*, 774. the prisoner could not be convicted of larceny for stealing a mere piece of paper, as the letter in the present case is. [*Lawrence* J. observed, that in Mrs. *Phipoe's* case the Judges only decided that the compelling a man by threats to draw a promissory note was not a felony.]

Abbott on the part of the Crown. The observation on the form of the indictment arises from that used in *R.* v. *Skutt:* but it is to be observed that the apparent reason why value was charged in that indictment was, that the letter did actually contain 5*s.* 3*d.* Of late years it has been the uniform practice in prosecutions of this kind to omit any allegation either of value or property: and indeed a letter as such can be of no value. The substantial objection depends upon the true construction of the statute. The 1st section of the 7 *Geo.* 3. *c.* 50. provides for certain specific offences committed by persons of a particular description, *viz.* the officers

of

The King v. Pooley.

of the post-office; and that without any regard to the place at which the offence is committed. Then the 2d section provides for another class of offences committed not by any particular description of persons, but by any person or persons whatsoever. If the argument which has been used in favour of the prisoner be successful, that the words "any persons whatsoever" are to be so restrained as to exclude the particular persons described in the 1st section of the act, it will follow that an officer of the post-office robbing the mail upon the highway could not be convicted under this 2d section, which provides for that offence. But it has been contended, that the taking a letter by a person entrusted with the possession of it, is not a stealing by reason of the trust. Now it is true, that in common cases a bailee would not be guilty of larceny. But the persons employed in the post-office are not the servants of the individuals to whom the letters belong, but the servants of the Crown. This appears from the case of *Whitfield* v. *Lord le Despenser*, *Cowp.* 754. where it was held that the Postmaster General was not liable as a common carrier, being the servant of the public. The case of *Rex* v. *Waite* therefore is not applicable to the present, the prisoner there having been the servant of a private corporation in which the property of the bond was vested. Besides, the trust reposed in the prisoner in this case did not extend to taking the letter out of the office, it having been his business to deliver it in the office to the person to whose walk it belonged. His possession of the letter was special and qualified, and resembled the possession which a butler has in the plate or a shepherd in the sheep of his master, who are guilty of larceny if they take the property entrusted to them; 1 *H. P. C.* 505.; or that of a confidential clerk, who takes a bill of exchange from the counting-house of his master and receives the money. *Rex* v. *Chipchace*, 2 *Leach*, *Crown Cas.* 805. ed. 3. It is clear that the offence committed in this case is within the meaning of the 7 *Geo.* 3. *c.* 50. *s.* 2.; and indeed if it be not, this consequence will follow, that the persons who have the greatest opportunity of committing the crime which the legislature meant to prevent, will not be subject to any punishment for so doing, since very few persons but those employed in the post-office have any opportunity of stealing any letter out of it. With respect to *Skutt*'s case, the point does not seem to have been fairly before the Judges; for, according to the report, the case was treated as arising

upon the 1st section of the statute; whereas it appears from the indictment to have been founded on the 2d.

1803.

The King v. Pooley.

The opinion of the Judges was never publicly communicated; but the prisoner was detained in custody until the 10th *July* last, when he was pardoned and discharged.

DECKER *v.* THOMSON.

Jan. 26th.

If after the time for pleading is out, but before judgment signed by the Defendant, the Court on his application stay proceedings till the Plaintiff give security for costs, to be approved by the prothonotary, the Plaintiff, though he give security *instanter*, which is accepted by the Defendant, is not at liberty to sign judgment before the opening of the office on the next morning.

THIS was a rule calling on the Plaintiff to shew cause why the judgment signed should not be set aside for irregularity.

A rule to plead having been given on the 30th of *June*, the time for pleading expired on the 3d of *July*. On the 6th of the same month, the Plaintiff not then having signed judgment, an application was made to the Court by the Defendant to stay proceedings until the Plaintiff should give security for costs to be approved by the prothonotary. This application was opposed in the first instance and granted by the Court: but on the same day, before any rule was drawn up, the Plaintiff gave security, which was accepted by the Defendant, immediately after which the Plaintiff signed judgment.

Shepherd Serjt. shewed cause, and contended that as the time for pleading was out before the application to the Court, and the Defendant had waved the prothonotary's approbation by accepting the security, the Plaintiff was at liberty to sign judgment as soon as he had complied with the order of the Court.

Best Serjt. *contrà.*

Lord ALVANLEY Ch. J. The Court having made an order that the Plaintiff should not proceed until he had given security, it was not competent to him to do the act, and sign judgment *uno flatu*.

CHAMBRE J. He ought to have waited till the opening of the office on the next morning.

Per Curiam, Rule absolute (*a*).

(*a*) It has been held that judgment may be signed immediately after the delivery of a bill of particulars, if the time for pleading be out. *Hifferman* v. *Langelle*, *ante*, vol. p. 363.

Jan. 27th.

LEEDS and Another *v.* WRIGHT.

A., the general agent in *London* of *B.* and Co. a house at *Paris*, with power to export for them to such markets as he should think fit, purchased goods in the name of *B.* and Co. of *C.* at *Manchester*, and directed them to be sent to *D.* a packer in *London*. After their arrival *A.* had some of the goods unpacked and sent away, and the remainder repacked. News then arrived of the failure of *B.* and Co. Held that the goods in *D*'s hands were no longer *in transitu*, and that *C.* therefore had no right to stop them.

TROVER for goods. The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last term, when it appeared that the goods in question were purchased of the Plaintiffs at *Manchester* by one *Moisseron* (who was the general agent in *London* of the house of *Le Grand* and Co. of *Paris*) in the name of that house; that by *Moisseron's* directions the goods were sent for him to the house of the Defendant in *London*, who was a packer, and arrived there on the 3d of *September* 1802; that upon their arrival there *Moisseron* came to the Defendant's house and had some of the goods unpacked and sent away, and the remainder repacked; that on the 7th of *September*, while the goods so repacked remained in the house of the Defendant, news arrived that the house of *Le Grand* and Co. at *Paris* had failed; upon which the Plaintiffs tendered to the Defendant his charges upon the goods and required that they should be delivered up to them. It also appeared that *Moisseron* had a general power either to send the goods to *Le Grand* and Co. at *Paris*, or to *Holland*, *Germany*, or such other market as he should think most beneficial. A verdict was found for the Defendant.

Best Serjt. now moved for a new trial, insisting that the goods, while in the hands of the Defendant, were still *in transitu*, and consequently that the Plaintiffs were entitled to recover them. He referred to *Hunt* v. *Ward*, cited in *Ellis* v. *Hunt*, 3 *T. R.* 467., where goods sent by order of the vendee to a packer were held to be *in transitu*, the packer being considered as a middle man between the vendor and vendee; also to *Stokes* v. *La Riviere*, cited in the same case, p. 466., and *Holst* v. *Pownal*, 1 *Esp. N P. Cas.* p. 240., to shew that goods must be considered *in transitu* till they arrive at their ultimate place of destination, and to *Hodgson* v. *Loy*, 7 *T. R.* 440.

Lord ALVANLEY Ch. J. These goods were not sent to the Defendant to be delivered by him to the house of *Le Grand* and Co. at *Paris*, but they were sent to *Moisseron*, the agent of that house in *London*, and were there to await his disposal, he being invested with authority to send them to such market as he should think most adviseable. The goods, therefore, were received by the De-

fendant,

1803. LEEDS and Another v. WRIGHT.

fendant, not on the account of *Le Grand* and Co., but on that of *Moisseron*. The delivery to the Defendant was clearly a delivery to *Moisseron*, although the goods were intended for exportation; and indeed his conduct shews that they were so considered, since, after their arrival at the Defendant's house, he ordered some to be unpacked and sent away, and the remainder to be repacked. None of the cases cited, therefore, apply to the present. Indeed *Moisseron* might, if he had so pleased, have made *London* the place of their ultimate destination, and disposed of the goods there.

HEATH, ROOKE, and CHAMBRE Js. concurring:

Best took nothing by his motion.

FULWOOD *v.* ANNIS.

Jan. 28th.

The Court of *C. B.* refused to amend a *scire facias* against bail.

THIS was a rule to shew cause why the Court should not amend the *teste* of a writ of *scire facias* against bail: there were fifteen days between the *teste* and return, but the former bore date before the writ of *ca. sa.*

Lord ALVANLEY Ch. J. The power of amending writs of *scire facias* against bail is certainly discretionary: but the Court in the exercise of their discretion do not think proper to cure any irregularities of which the bail are entitled to take advantage (*a*).

Rule discharged (*b*).

Vaughan Serjt. for the Plaintiff.

Shepherd Serjt. for the Defendant.

(*a*) In *Perkins* v. *Petit*, ante, vol. 2. p. 275. the Court intimated that in future amendments of this kind would be allowed, though they did not think proper to allow the amendment prayed in that case.

(*b*) In addition to the cases cited in *Perkins* v. *Petit*, to shew that amendments are not to be allowed in cases of bail, see *Grey* v. *Jefferson*, 2 *Str.* 1165.

ARBUCKLE and Another, Assignees of HENRY POOLE, Clerk, an insolvent Debtor, *v.* COWTAN.

Feb. 3d.

The profits of an ecclesiastical benefice do not pass to the assignees under an insolvent act, though included in the schedule of the insolvent.

ASSUMPSIT for the use and occupation of the vicarage house, garden, orchard, and glebe land, and all the vicarial tithes of the vicarage of the parish and parish church of *Hernhill* in the county of *Kent*.

This cause came on to be tried at the *Westminster* Sittings in *Easter* term last before Lord *Alvanley* Ch. J. pursuant to a decree of

of the Court of Chancery of the 14th of *July* 1801. A verdict was found for the Plaintiffs, damages 337*l.* 16*s.* 6*d.*, subject to the opinion of the Court upon the following case:

By articles of agreement in writing, dated the 17th day of *March* 1785, between the Rev. *Henry Poole* clerk, then and still being vicar of the parish of *Hernhill* in the county of *Kent* of the one part, and the above named Defendant of the other part, it was agreed that from *Michaelmas* 1784 the said *Henry Poole*, in consideration of the said Defendant paying him 90*l.* a-year on or before the 10th of *December*, and 30*l.* a-year to the curate, in two payments, viz. on the 9th of *February* and 9th *August*, and one guinea to the widows of clergymen in *Kent*, and 17*s.* in part of the tenths and the land-tax and parochial rates, should invest the said Defendant with every claim he had as vicar of *Hernhill* aforesaid, on the several occupiers of lands, wood, fruit, &c. together with the vicarage house, garden, orchard, and glebe land, except all surplice fees and church-yard dues; but with proviso that necessary repairs to the vicarage house, barn, stable, and fences of the yard, and garden gates and stiles should be at the costs and charges of the said *Henry Poole*, as well as any land-tax or poor's rates other than what the said vicarage was then charged with; and that the said Defendant should suffer one *John Groombridge* the then tenant of the vicarage house to continue as long as he paid the yearly rent of 8*l.*; and that the said agreement should continue until either of the parties thereto should give notice to the contrary three months at least before *Michaelmas*, at which time of the year and no other the said agreement should cease and determine. By virtue of this agreement the Defendant on the 17th day of *March* 1785 aforesaid entered upon the said premises in the said agreement mentioned, and hath continued from thence hitherto to hold and enjoy the same under and by virtue of the said agreement, and hath duly performed the said agreement in all things therein contained on his part to be done up to *Michaelmas* 1797. On the 3d day of *October* 1797, the said *Henry Poole* being a prisoner in the custody of the warden of his Majesty's prison of the *Fleet*, at the suit of divers persons, for debts amounting in the whole to a less sum than 1200*l.*, and being entitled to the benefit of the act of parliament passed in the 37th year of his present Majesty's reign, intitled, "An act for the relief of certain insolvent debtors," he the said *Henry*

4 *Poole*

Poole was on the said 3d day of *October* 1797, at the General Quarter Sessions of the peace for the city of *London* duly discharged from his said imprisonment by virtue of the said act, and did then and there deliver in a schedule of his real and personal estate according to the directions of the said act, in which schedule the said *Henry Poole* did (amongst other particulars of his estate and effects) insert the following article, *viz.* "The vicarage of *Hernhill* in *Kent*, the tithes of which have been paid to me to *Michaelmas* 1796, which I have applied for the support of myself and family." By a deed-poll dated the 10th day of *February* 1798, *William Rix* Esquire then being clerk of the peace for the city of *London*, did by virtue of the said act assign and convey all and singular the estate and effects of the said *Henry Poole* to the abovenamed Plaintiffs, in trust, for the benefit of themselves and the rest of the creditors of the said *Henry Poole*. On the 11th of *May* 1795 the said *Henry Poole* was directed by the Archbishop of *Canterbury* to augment the curate's salary from 30*l.* to 35*l* a year, whereupon the said Defendant was requested to pay the additional 5*l.*, and to deduct it from the 90*l.* annual rent; so that the net rent payable by the said Defendant from *Michaelmas* 1797 was 85*l.* a-year only. The question reserved for the opinion of the Court was, Whether under the circumstances above stated the Plaintiffs were entitled to recover any, and what sum of money from the Defendant in this action? If the Court should be of opinion that the Plaintiffs were entitled to recover any sum of money from the Defendant, a verdict to be entered for the Plaintiffs for that sum, subject to the further directions of the Court of Chancery. If on the contrary the Court should be of opinion that the Plaintiffs were not entitled to recover any thing in this action, then a verdict to be entered for the Defendant, subject as aforesaid.

Marshall Serjt. for the Plaintiffs. The question for the opinion of the Court is, Whether the profits of the vicarage, which has been assigned for the benefit of the insolvent's creditors, do or do not pass under that assignment? No express decision upon this subject is to be found, but the words of the assignment being sufficiently comprehensive to pass every species of property to which the insolvent was entitled, must necessarily be held to include this particular property. The revenues of a clergyman have never been deemed a mere stipend for the performance of a duty, but consti-

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1803.
ARBUCKLE and Another v. COWTAN.

tute a freehold; and it is on that account that executions have been allowed against this species of property for the recovery of debts. Sir *Edward Coke* in 2 *Inst.* 472. says, If the sheriff return that the Defendant is *clericus et beneficiatus nullum habens laicum feodum*, the Plaintiff shall have a writ to the bishop to levy *de bonis ecclesiasticis*; who thereupon appoints sequestrators, and sufficient being reserved to serve the cure, the remainder is taken under the execution. It is quite clear that a clergyman may be a bankrupt, and if so, the fruits of his benefice must pass to his assignees. In the case *ex parte Meymot*, 1 *Atk.* 196. where it was contested whether a clergyman could become a bankrupt, Lord *Hardwicke*, in considering the objection, though he does not expressly decide whether a benefice would pass to the assignees, seems to think that it would. He says, "To be sure there are in the bankrupt acts no words that relate merely to ecclesiastical estates, and therefore it is said, if the whole living is seized it may prevent serving the cure. But I do not know that this would be the consequence." His lordship then refers to the special execution at law *de bonis ecclesiasticis*; and adds, "I do not see, but I give no opinion, why the same method may not be followed under a commission of bankruptcy, for it does not appear to me that this would supersede the bishop's authority." If the case of *Flarty* v. *Odlum*, 3 *T. R.* 681. be relied upon, where it was decided that the half pay of an officer could not be assigned under an insolvent act, it may be observed that no two cases can be more different, an officer having no certain interest in his half pay, and not being able to maintain an action for it, whereas a clergyman has a freehold in his living. It is to be recollected also that it has been the constant practice for clergymen to make provision for their families by raising annuities upon their livings, which they could not do, if they had not the power of assigning their interest in their livings: and if a clergyman himself can assign his living, there is no reason why it should not pass under the assignment of the law.

Shepherd Serjt. for the Defendant. Although the fruits of a vicarage are liable to the payment of the debts of the vicar when sequestration is granted by the bishop, yet they do not pass under this sort of statute execution. It is clear that, notwithstanding the general words of the assignment, there are some things which do not pass: such as the half pay of an officer, as was decided in *Flarty* v. *Odlum*.

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The agreement made between the vicar and the Defendant can make no difference in the case: for if such a lease or agreement were assignable the vicar might divest himself of all the benefit arising from his living, consequently of all power of serving the cure, which the law will not allow; for the revenues arising from a vicarage are intended for the purpose of supporting a vicar in the service of the church. By the 13 *Eliz.* c. 10. all leases, gifts, grants, conveyances, feoffments, or estates, made by spiritual persons for more than the term of 21 years or three lives, whereupon the accustomed yearly rent is reserved, are void. It is true that the title of that act and its provisions are framed as if made for the protection, not of the spiritual persons themselves, but of their successors. But when we look at the 14 *Eliz.* c. 11. *f.* 15. which, after reciting that evil disposed persons had defrauded the true meaning of the 13 *Eliz.* by entering into bonds and covenants to suffer other persons to enjoy their livings, which bonds and covenants were not held to be leases, it was enacted that all bonds, contracts, promises, and covenants for the above purpose should only be of such force and validity as leases made by the same persons. From this it appears that the object of the legislature was to prevent ecclesiastical persons from charging their benefices except by lease, reserving the accustomed rent: and it is clear that these provisions must have been made with a view to protect ecclesiastical persons against their own imprudence, and not merely to protect their successors, who could not be charged by the bond or covenant of their predecessor. The object was not only to prevent dilapidations, but to secure a proper revenue to ecclesiastical persons, with which they might support a becoming hospitality. If a vicar be allowed to lease, reserving a rent, and then to assign the reversion, it is the same thing as if he were allowed to lease without reserving any rent whatever: consequently the vicar in this case could not himself have assigned this agreement to his creditors. Can it be contended, then, that under the insolvent act that will pass to his creditors which he could not have assigned to them? It has always been holden that nothing passes under those acts but what the party himself could consistently with the nature of his interest and with public policy have transferred. On this principle proceeded the case of *Flarty* v. *Odlum*. Nor will it make any difference that the insolvent has inserted this property in his schedule; for though he may have thought himself

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1803.
ARBUCKLE and Another v. COWTAN

bound by his oath to insert it, still if it be that sort of property which he could not assign, it will not pass. Where the execution against a benefice proceeds not on common process, but on a writ directed to the bishop, those inconveniencies which the legislature has been studious to guard against are prevented: for the bishop in sequestering has a right to deduct a reasonable sum for the supply of the cure, and likewise for the maintenance of the incumbent and his family, if he hath not otherwise sufficient to maintain them. *Burn's Eccl Law*, tit. *Sequestration*, vol. 3. p. 318. ed. 2. If it be urged that the insolvent himself has provided by his agreement for serving the cure; it may be answered, that the service of the cure is only one of the things to be provided for by the bishop, who is also bound to take care both of the incumbent himself and of his family. With respect to the opinion supposed to have been expressed by Lord *Hardwicke* in *Ex parte Meymot*, it is observable that when he suggests that a spiritual preferment may possibly be within the statutes of bankrupt, he expressly assigns as a reason that a writ may issue to the bishop, and he may apportion a part to serve the cure.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY C. J. With respect to all sums of money which had become due to the insolvent at the time when he took the benefit of the insolvent act, it is admitted that the Plaintiffs are entitled to recover. Unquestionably every right and interest in possession, which had vested in the insolvent previous to the passing of the 37th of *Geo.* 3 *c.* 112., was by that act immediately transferred to the assignees; and whatever action might have been brought by the insolvent, may be maintained by the assignees. So long as the Defendant continued in the occupation of the vicarage, he was liable to the payment of the stipulated sum; as far, therefore, as the action extends to the arrears which were due at the time when the insolvent took the benefit of the act, the claim of the assignees may be maintained. Supposing a commission of bankrupt to extend to persons in holy orders, still the question will be, Whether the assignees under this insolvent act have succeeded to the rights of the insolvent in all the revenues of the church of which he was vicar? for it is impossible to contend that they are entitled under the agreement, without also contending that if there had

been no agreement they would have been in the same situation as the vicar himself, and would have been entitled to demand from the possessors of the glebe-lands and from the terre-tenants of the parish the rent and tithes due to the vicar of *Hernhill*. In short, it must be argued, that although the insolvent act does not expressly make the assignees vicars, yet that it invests them with all the ecclesiastical rights of the vicar. It is material to consider how the common law stood with respect to the rights with which creditors of persons in holy orders and beneficed clerks were cloathed. No one is ignorant that at common law land could not be taken into the hands of the creditor himself; the profits only could be taken by a writ of *levari facias* directed to the sheriff, who was thereby empowered to levy the profits arising from time to time for the benefit of the creditor. The common law was extremely jealous of obtruding any new tenant on the lord; it did not allow, therefore, any possession to be taken under the *levari facias*, but only the profits to be levied. By the statute of *Westm.* 2., which gave the writ of *elegit*, an alteration was introduced in this respect. By that act the creditor was permitted to make use of a process by which he was put into possession of the land itself. At all times, however, the king was entitled to take possession under an extent, for the objection to changing the tenant did not apply to the case of the king. His right was independent of the statute of *Westm.* 2.: but it must not be forgotten that while the common law remained unaltered the king never claimed any authority to take possession of ecclesiastical rights or dues by the hands of his own ministers the sheriffs. He was always obliged to have recourse to a writ to the bishop, under which the lands were sequestered. Under that writ possession was not given, but the ordinary was bound to take care that out of the revenues of the church the duties of the church should be provided for. We find in 2 *Inst.* p. 4. that Lord *Coke* says, "if a person be bound in a recognizance in the Chancery, or in any other court, &c. and he pay not the sum at the day, by the common law if the person had nothing but ecclesiastical goods the recognizee could not have had a *levari facias* to the sheriff to levy the same of those goods, but the writ ought to be directed to the bishop of the diocese to levy the same of his ecclesiastical goods." In *Gilbert on Executions*, p. 40. it is said, "*elegit* does not lie of the [illegible], or vi[illegible], nor to the church-yard; for these are each *solum Deo consecratum*;" and for this is cited *Jen-*

 kins'

1803. ARBUCKLE and Another v. COWTAN.

kins' Rep. 207. where the same doctrine is laid down; and also that no *capias* or *fieri facias* can issue against a clerk if it appears that he has no lay fee, but only a *levari facias* to the bishop. *Jenkins* refers to two cases from the Year-books, *viz.* 29 *Ed.* 3. 44. and 21 *Ed* 4. 45. We have therefore complete authority for saying, that at common law no process ever issued to a sheriff to levy on ecclesiastical property the debt due in an action, and *Gilbert* is well warranted in saying that no *elegit* lies. Sir *Wm. Blackstone* in the 3d volume of the Commentaries, *p.* 418. gives an account of the writ of sequestration to the bishop of the diocese, which he says is in the nature of a *levari* or *fieri facias* to levy the debt and damages *de bonis ecclesiasticis*, which are not to be touched by lay hands. The same account is given of the writ in *Burn's Eccl. Law*, tit. *Sequestration*. There has been much argument respecting the power which a clergyman had over his own benefice. It has never been contended however that a parson was ever seised in fee, he had only a qualified right in his living, and at common law could make no lease to bind his successor, unless confirmed by the patron and ordinary. In the reigns of *Hen.* 8. and *Eliz.* several statutes were passed introducing further restrictions with respect to the power of ecclesiastics over their benefices. Until the 13 *Eliz c.* 20. they all appear to have been made for the benefit of the successor: so great was the anxiety of the legislature however to prevent ecclesiastics from divesting their own rights, that the statute of 13 *Eliz. c.* 20. explained by 18 *Eliz. c.* 11. empowers them to take advantage of their own non-residence to defeat leases made by themselves. Such has been determined to be the effect of that statute in the late case of *Frogmorton* d. *Fleming* v. *Scott*, 2 *East* 467. It is now clearly established that the half pay of an officer is not assignable, and unquestionably any salary paid for the performance of a public duty ought not to be perverted to other uses than those for which it is intended. Notwithstanding the case of *Steuart* v. *Tucker* (*a*), in which it was held that the half pay of an officer was assignable in equity, it was expressly decided in *Flarty* v. *Odlum* that it was not assignable at all, which decision met with general approbation. This doctrine is very analogous to that which has been adopted with respect to ecclesiastics; the same policy is applicable to both cases. Having considered in what manner debts might be enforced against ecclesiastics at common law, I will now consider whether the statute

(*a*) 2 *Bl.* 113

relative

relative to bankrupts and insolvents have introduced any alteration in this respect. That a private creditor should be able to avail himself of a writ of sequestration for the purpose of satisfying his debt out of the benefice of a clergyman, and yet that where the legislature has vested the whole property of the debtor in assignees for the benefit of the creditors in general, those assignees should not have any power to affect his benefice, would certainly be an anomaly in the law. Whether there be any means of obviating this anomaly I will not pretend to say. Lord *Hardwicke*, in the case *ex parte Meymott*, abstains from laying down decisively in what manner the claims of the assignees upon such property might be made available. He seems however to think that in a writ to the bishop the assignees might have the same remedy as any other creditor. But he never hints at an idea that they could take possession of the benefice in the same manner as they might of lay property. The only question in that case was, whether a clergyman could be made a bankrupt. Mr. *Wilbraham* in arguing for the negative insisted that his living could not be assigned by the commission, for that the assignees must take all or none; and if they took all, nothing would be left to provide for the service of the cure. Lord *Hardwicke*, who inclined to think that a clergyman might be a bankrupt, after noticing this objection, and stating the common law rule with respect to sequestration, says, "I do not see, (but I give no opinion) why the same method may not be followed under the commission of bankruptcy, for it does not appear to me that this would supersede the bishop's authority." As a long time has elapsed since this opinion was thrown out, during which some clergymen must probably have rendered themselves obnoxious to commissions of bankrupt, I desired inquiries to be made respecting the mode of proceeding adopted under those commissions. But these inquiries have not produced any instance in which proceedings against a benefice have taken place. Nor shall I undertake to point out in what manner the assignees in this case must proceed. But although there may be difficulties in the mode of proceeding, we are not therefore to hold that the nature of the property which a clergyman has in his benefice is changed by the operation of an insolvent act, or that the assignees under such an act will be entitled to demand and receive ecclesiastical dues. The agreement in this case is a mere letter of attorney given by the clergyman to the Defendant. If this agreement could be deemed

1803.
ARBUCKLE and another v. COWTAN

a case,

1803.

ARBUCKLE and Another v. COWTAN.

a lease, it would be void upon the face of it. It would be a lease on the parsonage house, with a covenant that the new tenant should occupy: this would be *felo de se*. Whatever advantage might be derived through the intervention of the ordinary, I am of opinion that by no conveyance of the party himself could he divest himself of his benefice. The same reasons which have induced the common law to prevent execution against a benefice by the hands of the king's civil ministers, may be urged with equal force against the action now brought by the assignees. We are therefore of opinion that the action is not maintainable so far as it relates to the rent which has accrued subsequent to the assignment under the insolvent act.

Per Curiam, Verdict to be entered for the Defendant.

Feb. 3d.

STRATTON and Another v. SAVIGNAC.

A replication to a plea of tender, stating an original writ sued out and returned before the tender, but not proceeded upon, and then a 2d original writ sued out after the tender and proceeded upon, but unconnected with the 1st writ, is no answer to the plea.

INDEBITATUS assumpsit for work and labour, goods sold and delivered, money lent and advanced, paid, laid out, and expended, had and received, and on an account stated.

The Defendant pleaded *non assumpsit* as to all but 9*l.* 15*s.* 4*d.*; and as to that sum he pleaded that "from the time of making the several promises and undertakings in the declaration mentioned he always hitherto was and still is ready to pay the same to the Plaintiffs; and before the suing out the original writ of the Plaintiffs, to wit, on 11th *February* 1802, at, &c. tendered and offered to pay the same to the Plaintiffs, which they refused to receive;" and the Defendant brought the said 9*l.* 15*s.* 4*d.* into court.

The Plaintiffs replied, that "as to 9*l.* 15*s.* 4*d.* parcel, &c. *præcludi non* from recovering more and greater damages than the said 9*l.* 15*s.* 4*d.* in that behalf, because they say, that after the making of the said promises and undertakings in the said declaration mentioned as to the said 9*l.* 15*s.* 4*d.*, (that is to say) on the 25th day of *January* 1802, at, &c. they the said Plaintiffs for the recovery of their damages by them sustained by reason of the non-performance of the said several promises and undertakings in the said declaration mentioned, as well as to the said sum of 9*l.* 15*s.* 4*d.* parcel, &c. as otherwise, caused to be sued and prosecuted out of the Court of our Lord the King of his Chancery, (the said Court then being held at *Westminster* in the county of *Middlesex*) a certain writ of our Lord the King, commonly called a writ of *quare*

1803.

STRATTON and ANOTHER v. SAVIGNAC.

clausum fregit, against the said Defendant, directed to the sheriff of *Middlesex*, by which said writ our said Lord the King commanded the sheriff of *Middlesex*, that if the said Plaintiffs should give him security to prosecute their suit, then the sheriff of *Middlesex* should put by surety and safe pledges the said Defendant that he should be before our said Lord the King's justices at *Westminster* in eight days of the Purification of the Blessed *Mary* then next, to shew why with force and arms he broke the close of the said Plaintiffs at *Westminster*, and did them other wrongs, to the great damage of the Plaintiffs, and against the peace of our said Lord the King; and that the said sheriff should have there the names of the pledges and that writ. At which day of the return of that writ, (that is to say) in eight days of the Purification of the Blessed *Mary*, in the 42d year aforesaid, at *Westminster* in the county of *Middlesex*, (that is to say) at *London* aforesaid, in the parish and ward aforesaid, the sheriff of *Middlesex*, (to wit) *W. R.* Esquire and *R. A. C.* Esquire then being sheriff of *Middlesex*, returned on the said writ to the justices of our Lord the King of the Bench at *Westminster*, that the said Defendant in the said writ named had not any thing in his bailiwick whereby he should be attached; wherefore the said Plaintiffs for the purpose aforesaid prayed another writ of our Lord the King to be directed to the sheriff of *Middlesex* in form aforesaid. And it was granted them, &c. And thereupon the said Plaintiffs for the recovery of their damages aforesaid, afterwards, (to wit) on the *15th day of* April, *in the 42d year aforesaid*, at, &c. aforesaid, caused to be sued and prosecuted out of the said Court of our Lord the King of his Chancery (the said Court then being held at *Westminster* aforesaid in the said county of *Middlesex*) a certain other writ of our Lord the King, commonly called a writ of *quare clausum fregit*, against the said Defendant, directed to the sheriff of *Middlesex*,"—(proceeding as with the former writ, and alleging that being summoned upon this 2d writ the Defendant appeared.) " And the said Plaintiffs further say, that the said several writs so by them sued and prosecuted as aforesaid against the said Defendant, were so by them sued and prosecuted against the said Defendant with intent to implead the said Defendant for the several causes in the said declaration in this behalf above specified, and to cause and compel the said Defendant to appear in the said Court here in order that they the said Plaintiffs might declare against him for the

1803.
STRATTON and Another v. SAVIGNAC.

said several causes of action in the said declaration mentioned, according to the course, custom, and practice of the said Court here. And they the said Plaintiffs, in pursuance of such their said intention, did, after such the said appearance of the said Defendant as aforesaid, declare thereupon and for the said several causes of action in the said declaration mentioned in manner and form aforesaid, and therein (amongst other things) for the said sum of 9*l.* 15*s.* 4*d*, parcel, &c. and for the damages by them sustained on occasion of the not performing the said several promises and undertakings in the said declaration mentioned as to the said 9*l.* 15*s.* 4*d.* And the said Plaintiffs further say, that the said Defendant did not at any time before the suing forth of the said first-mentioned writ out of the said Court of our said Lord the King of his Chancery, in manner and for the cause and purpose aforesaid, tender or offer to pay to the said Plaintiffs the said sum of 9*l.* 15*s.* 4*d.*, parcel, &c. And this, &c. Wherefore, &c."

The Defendant rejoined, that "true it is that the said Defendant did not at any time before the suing forth of the said writ in the said plea of the said Plaintiffs above pleaded in reply first mentioned, tender or offer to pay to the said Plaintiffs the said sum of 9*l.* 15*s.* 4*d.*, parcel, &c.; but the said Defendant says, that the said Defendant before the suing out of the said writ in the said plea of the said Plaintiffs above pleaded in reply, secondly above mentioned, (to wit), on the said 11th day of *February*, in the said year of our Lord 1802, at, &c. tendered and offered to pay to the said Plaintiffs the said 9*l.* 15*s.* 4*d.*, which said 9*l.* 15*s.* 4*d.* the Plaintiffs then and there wholly refused to receive from the said Defendant. And this, &c. Wherefore, &c."

To this there was a general demurrer, and joinder therein.

Bayley Serjt. in support of the demurrer, after citing the several cases of *Giles* v. *Hartis*, 1 *Ld. Raym.* 254. *Sweetland* v. *Squire*, 2 *Salk.* 623. and *Clemens* v. *Reynolds*, *Say.* 18. to shew that a plea of tender which does not allege that the Defendant was always from the time when the cause of action accrued ready to pay, is bad upon demurrer, was proceeding to argue that the first writ of *quare clausum fregit* in this case appearing to have been regularly sued out previous to the tender pleaded, the Defendants' rejoinder could not be sustained,

When *The Court* interrupted him by observing, that however regularly the first writ was sued out, still it did not appear to have

1803.

STRATTON and Another v. SAVIGNAC.

been properly continued (*a*), and therefore could not be connected with the second writ so as to avail the Plaintiffs.

Bayley then urged, that merely suing out process was a demand, and consequently the tender was not good unless made previous to that demand.

But *The Court* were clearly of opinion that the mere circumstance of process sued out was not sufficient, since possibly it might be for some other cause of action, and if allowed to operate in the way contended for, would open a door to much inconvenience by enabling persons to keep such process secretly in their pockets 'till such stage of the pleadings as they should be disposed to bring it forward.

Per Curiam, Judgment for the Defendant.

Heywood Serjt. was to have argued *è contrà*.

(*a*) See 2 *Ld. Ray.* 434.

POLLARD *v.* Sir ROBERT HERRIES Knt.

Feb. 3d.

A. deposited a sum of money at the banking-house of *B.* in *Paris*, for which *B.* gave him his note "payable in *Paris*, or at the choice of the bearer at the *Union* Bank in *Dover*, or at my usual residence in *London*, according to the course of exchange upon *Paris*," after this note was given the direct course of exchange between *London* and *Paris* ceased altogether, having been previous to its total cessation extremely low; the note was at a subsequent period presented for acceptance and payment at the residence of *B.* in *London*, at which time there was a circuitous course of exchange upon *Paris* by way of *Hamburgh* Held that *A.* was entitled to recover upon the note according to such circuitous course of exchange upon *Paris* at the time when the note was presented.

THIS was an action of *assumpsit* brought on a promissory note, of which the following is a literal copy:

Branche à

Paris *ce* 20 Mai 1791 *P*r 1200 *Tournois*.

En face du Pont Royal.

A sept jours de vue prèfixe je payerai a l'ordre de Monsieur John Carter Pollard *la somme de douze cents livres Tournois avec l'interêt convenu à raison de trois pour cent par an, valeur reçu comptant.*

*Per proc*n. *de Sir* Robt. Herries.

Payable, comme dessus, dans Paris, *au choix du porteur, dans* Douvres *à* l'Union Bank, *et dans* Londres *à mon domicile ordinaire*

Présenté et verifié à — *le* 17 *Au cours d'Usance sur* Paris.

JAMES CAREY.

En registre fol. 42 A. F. P."

10th *May* 99. E. W.

Which

1803.

POLLARD *v.* HERRIES.

Which promiſſory note was thus tranſlated:

Paris, the 20th of *May* 1791—For 1200 livres Tournois. At ſeven days ſight, according to agreement, I promiſe to pay to the order of Mr. *John Carter Pollard* the ſum of twelve hundred *livres Tournois*, with the intereſt agreed for, at the rate of three *per cent. per annum*, value received down.

Payable as above in *Paris*, or, at the choice of the bearer, at the *Union* Bank in *Dover*, or at my uſual reſidence in *London*, according to the courſe of exchange upon *Paris*. } Preſented and verified at ——— 17.

By procuration of Sir *Robt. Herries*.
James Carey.

The two firſt counts of the declaration were upon the ſaid note. In the firſt count the words "au cours d'uſance ſur *Paris*" were taken to mean "according to the courſe of exchange upon *Paris*." In the ſecond count theſe words were wholly omitted. The third count was upon an *indebitatus aſſumpſit* for the value of foreign money paid, laid out, and expended by the Plaintiff for the uſe of the Defendant. The fourth was for the value of foreign money lent and advanced by the Plaintiff to the Defendant. The fifth was for the value of foreign money had and received by the Defendant to the uſe of the Plaintiff. And the ſixth was upon an account ſtated between the Plaintiff and Defendant. To this declaration the Defendant pleaded the general iſſue, and paid into Court the ſum of 18 *l.* 16 *s.* 6 *d.* upon the whole declaration generally.

This cauſe was tried before Lord *Eldon* Ch. J. and a ſpecial jury at the *Guildhall* ſittings after *Hilary* term 1801, when a verdict was found for the Plaintiff for 40 *l.* 6 *s.* 10 *d.* damages, ſubject to the opinion of the Court upon the following caſe:

For a long time previous to the *French* revolution, and for ſome time ſubſequent to that period, the Defendant kept a banking-houſe at *Paris*, into which many perſons on their travels were accuſtomed to pay their money, for which they took promiſſory notes ſimilar in form to that which is the ſubject of the preſent action. On the 20th of *May* 1791 the Plaintiff paid into the Defendant's banking-houſe at *Paris* the ſum of 1200 *livres Tournois* in aſſignats, then the circulating medium of *France*, which were received at the Defendant's ſaid banking-houſe in caſh, and for which the Plaintiff received the above promiſſory note. On the

10th *May* 1799 the said note was presented for acceptance, and again on the 20th of the same month for payment in *London*, at the usual residence of the Defendant. When there was a course of exchange between *London* and *Paris* it was regulated by the *écu* or *French* crown of three *livres Tournois*, in sterling pence; and when this exchange was at par the *French* crown was of the value of thirty pence sterling. At the time when the said note was made and delivered to the Plaintiff there was a direct course of exchange between *London* and *Paris* at the rate of 24 pence sterling for the *French* crown. In the month of *August* in the year 1793, in consequence of the war, the exchange fell so low as four-pence farthing for the *French* crown of three *livres Tournois*, and in the month of *October* following it finally closed at nine-pence for the *French* crown. On the 20th *May* 1799, the time when the said note was presented for payment in *London*, as the war was still continuing between *Great Britain* and *France*, there was no direct course of exchange between *London* and *Paris*; but there was then, and there still is, a circuitous course of exchange between those cities through *Hamburgh*. At that time, according to the course of exchange between *Paris* and *Hamburgh*, 1200 *livres Tournois* were of the value of 589 marks and 7 *schelins*, and this sum, according to the course of exchange at the same time between *Hamburgh* and *London*, was of the value of 47 *l.* 3 *s.* 4 *d.* sterling, which sum, together with 12 *l.*, the interest thereof at 3 *per cent. per ann.* for 8 years, from the 20th of *May* 1791 to the 20th of *May* 1799, making together the sum of 59 *l.* 3 *s.* 4 *d.*, was the amount of the sum claimed to be recovered by the Plaintiff in this action, as being the value of the said note on the said 20th *May* 1799, when it was presented in *London* for payment, according to the above circuitous course of exchange. But the sum of 18 *l.* 16 *s.* 6 *d.* was paid into court by the Defendant, as being the value of the said 1200 livres and the interest thereon at 3 *per cent. per ann.*, taking the exchange at 9 *d.* sterling for the *French* crown of three livres, according to the last direct course of exchange between *London* and *Paris* before the commencement of the war. The question submitted to the opinion of the Court was, Whether the Plaintiff were entitled to recover the above sum of 59 *l.* 3 *s.* 4 *d.*, the value of the said 1200 livres and interest, according to the course of exchange between *London* and *Paris* through *Hamburgh*

at

1795. [illegible]

at which time, when the said note was presented for payment in London? If the Court should be of that opinion, then the jury found a verdict for the Plaintiff, damages [illegible]l. 6s. 10d., which, with the said sum of 20l. 16s. 6d. paid into court by the Defendant, amounted to the above sum of 59l. 3s. 4d. But if the Court should be of opinion that the Plaintiff had no right to claim from the Defendant more than the value of the said 1200 livres and the interest thereon, according to the last direct course of exchange between *London* and *Paris* before the commencement of the war, then, as the said sum of 18l. 10s. 6d., which was sufficient to satisfy that claim, had been paid into court and is struck out of the declaration, the jury found a verdict for the Defendant.

Marshall Serjt. for the Plaintiff. The question in this case is, by what course of exchange the Plaintiff is to be paid; whether by the last direct course of exchange which existed previous to the commencement of the war between this country and *France*, or by the circuitous course which existed at the time when payment of the note was demanded? The note in question is for 1200 livres payable at *Paris*, *Dover*, or *London*. Now if demanded at either of the two latter places, it must have reference to some existing course of exchange; though if demanded at *Paris* it would be unnecessary to calculate any course of exchange, as it would be paid by the precise amount of *French* money mentioned in the bill. Although the direct intercourse between this country and *France* was interrupted at the time when payment of the note was demanded, still there could be no difficulty in paying it according to the existing course of exchange. The mode by which a merchant would effect this, would be to purchase a bill upon *Hamburgh* in *London*, which bill, when transmitted to *Hamburgh*, would purchase another upon *Paris*. It is true that the Defendant will be a sufferer by this mode of payment, but that consideration cannot excuse him from the performance of his contract: for the general rule of law is, that even the impossibility of performing a contract will not excuse the contracting party, unless that impossibility arise from the interposition of the law. The case states what was the best course of exchange for the Defendant at the time when the bill was demanded; and as the Defendant has undertaken to pay according to the course of exchange, there being no direct exchange, he must perform it *cy prés*; namely, by adopting the shortest circuitous

cuitous mode of exchange. A question similar to this arose before Lord *Kenyon* at *nisi prius*, who decided it immediately, saying, if the high road be out of repair, the party must go on the adjoining land. So in *Cuming* v. *Munro*, 5 *T. R.* 87 in debt for 1400*l.* of money of *Great Britain*, on a bond for 2400*l* proclamation money of *North Carolina*, the Court refused to allow the Defendant to pay the 2400*l. Carolina* money into court, saying, "The proclamation money was of a certain value when the bond was given, and also when it was forfeited; but by change of time and circumstances it is now rendered of no value whatever, and therefore justice could not be done between the parties if we were to determine that the Defendant should be at liberty to pay that which is now of no value, but which, had he paid his debt when it became due, would have been of great value." If it be said that the Plaintiff ought to have presented the note sooner; the answer is, there is nothing on the face of the bill to prevent his keeping it for any number of years which he might think proper: and, indeed, had it not been for the interruption of the exchange the Defendant would have derived an advantage from his not presenting the note sooner, since he allowed only 3 *per cent* for the money deposited, which was the consideration of the note, and made a larger interest himself.

Williams Serjt. *contrà*. If the Defendant pays this bill according to the last course of exchange between *London* and *Paris* he will perform his contract as nearly as possible; and the Plaintiff will suffer justly for not having presented it sooner. The words "*au cours d'usance*" can only be explained by considering the nature of the note: the import of which is this; "If you do not receive the money at *Paris*, then I will pay it at *Dover* or in *London*, according to such usance as shall exist with respect to bills upon *Paris* at the time when payment shall be demanded." The mode of payment, therefore, in contemplation of the parties in case of the note being demanded at *London* or *Dover* seems to have been by a bill upon *Paris*. Admitting this interpretation, the word "usance" is an understood mercantile term, and, as applied to bills, differs according to the places upon which they are drawn. [*The Court* observed, that as the jury had translated the words "*au cours d'usance*" they should adhere to that translation.] At the time when this note was presented, the precise performance of the contract had become impossible; for no direct course of

1803. POLLARD v. HERRIES.

exchange between *London* and *Paris* existed. The Defendant therefore is excused; for the rule of law, as laid down in *Paradine* v. *Jane*, *Aleyn*, 27. is, that "when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, *if he may*, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." But in this case the Defendant was absolutely prevented by change of circumstances, and by the neglect of the Plaintiff in presenting the note sooner. He will therefore be excused if he perform his contract "*cy prés*" according to the last direct course of exchange between *London* and *Paris*. If, however, the Court should think that this is not the proper rule, then it may be contended that the action has been brought too soon, and that the Plaintiff should have waited until a direct course of exchange between *London* and *Paris* was renewed. If the construction contended for by the Plaintiff be adopted, the Plaintiff, by keeping the note, may oblige the Defendant to pay it in a manner totally different from that which was contracted for, and which may amount to fifty times as much as was in the contemplation of the parties.

Lord ALVANLEY Ch. J. The argument of my Brother *Williams* must necessarily go the length of contending, that at the time when payment of the note in question was demanded no course of exchange between *London* and *Paris* whatsoever existed. If his argument will not go this length, I think that he cannot succeed. At first I entertained some doubts whether at the time when the note was made it was not the intention of the parties that the money should be paid according to the direct course of exchange only, and consequently whether this circuitous course of exchange which has been set up could possibly regulate the payment. The principles laid down at the bar, respecting the force of obligations created by a party against himself, are not to be controverted; nor can it be disputed that whatever be the nature of the contract into which a subject of this country enters, he is excused from the performance of it, if the laws of his country interpose and forbid the performance. The Defendant therefore in this case was most clearly excused from that part of his contract which imposed upon him the necessity of paying the 1200 livres at *Paris*, because such payments at the commencement of the war between this country and *France* were forbidden by law. But in this contract there are two other terms; for the Defendant engages to pay not only at

Paris,

Paris, but at *Dover* or *London*. What reason then has he given for not performing his contract when payment of it was demanded in *London*? He says that he engaged to pay according to the course of exchange between *London* and *Paris*, and that at the time he so engaged the course of exchange in contemplation between himself and the Plaintiff was the direct course of exchange between those two places. Having shewn then that no direct course of exchange existed at the time when payment of the note was demanded, the Defendant offers to pay according to the last direct course of exchange which existed before that time. But the Plaintiff has a right to dispute this mode of payment which the Defendant thinks proper arbitrarily to adopt, and may as well contend that he chuses to be paid according to the course of exchange which existed at the time when the money was deposited. I think therefore that we cannot with propriety refer to any course of exchange previous to the demand of payment, but that according to the ordinary rules of construction the Defendant is bound to perform his contract notwithstanding intervening circumstances may have subjected him to some inconvenience. The peculiar circumstances of the late war induced the legislature of this country to do what had never been done before, unless perhaps in the time of King *William*, namely, to prohibit under certain penalties the subjects of this country from remitting money to *France*. In consequence of this, a much more circuitous and expensive course of exchange was necessarily adopted; and the Defendant being called upon to pay in *London* according to that circuitous and expensive course, suffers a hardship. Whatever doubts, however, I may have entertained, I now think that the soundest construction for us to adopt, and which will be subject to the least inconvenience, is, that the Defendant is bound to pay the note according to that indirect course of exchange which existed at the time when payment was demanded. The Plaintiff therefore will be entitled to the larger sum found by the jury.

HEATH J. I have very little difficulty upon this subject: for though I agree that neither of the parties contemplated the interruption in the course of exchange which the war produced; yet let us consider what was the real nature of the contract between the parties. The Defendant received a sum of money from the Plaintiff, for which he was to pay a very small interest; clearly therefore it could not be worth the Defendant's while to keep the bill

1803. POLLARD v. HERRIES.

bill in his hand merely upon the speculation of making an advantage of it by some alteration in the course of exchange; and indeed the longer he kept the note the longer the Defendant had to make a large interest of money, for which he paid the Plaintiff but a small interest. The contract between the parties being that the Defendant should pay according to the course of exchange between *London* and *Paris*, and that contract not being unlawful, the Defendant must fulfil his engagement when called upon, notwithstanding circumstances may have rendered that engagement disadvantageous to him.

ROOKE J. I am of the same opinion. According to the course of dealing established by the Defendant, he received a deposit of money from persons upon their travels, allowing them only three *per cent.* interest, and gave them notes payable at *Paris*, *Dover*, or *London*. It was understood between the parties that the persons to whom these notes were given might keep them as long as they should find it convenient, and the Defendant undertook that when they chose to demand payment of them, he would pay according to the course of exchange upon *Paris*. Now the shortest course of exchange upon *Paris* at the time when payment was demanded was by way of *Hamburgh*, and the Plaintiff only desires to be paid according to that course. The Defendant therefore, unless he can shew a shorter course to have existed at that time, must pay the note according to the course of exchange through *Hamburgh*. Whatever inconvenience he may suffer from this construction, he must attribute to himself alone for not having guarded against it by the terms of his contract.

CHAMBRE J. We must recollect that this is a loan by the Defendant to the Plaintiff, not of a bill of exchange, but of his promissory note given for money deposited with him. That note was intended to serve other purposes than that of merely securing re-payment of the money deposited, and in contemplation of the peculiar accommodation which he was to derive from this note, the Plaintiff parted with this money at a less rate of interest than he might otherwise have reasonably demanded. It certainly was not in the contemplation of either party that any inconvenience could arise from the Plaintiff not presenting the note for payment sooner than he did. That circumstance however makes it necessary to decide what mode of payment shall now be adopted. The mode pointed out on the face of the contract is the course of exchange

or

on *Paris*; and indeed I do not think that the terms of the note could have been tranflated otherwife than they have. The note does not exprefs that the money fhall be paid at the ufual courfe of exchange, or at the courfe of exchange fubfifting between the two countries at the time when the fecurity was given, but merely according to the courfe of exchange. Then to what are we to look, but to the courfe of exchange actually fubfifting between *London* and *Paris* when payment was demanded? Probably there were many other more circuitous courfes of exchange on *Paris*, but the neareft is pointed out by the cafe, and the Plaintiff's demand affeffed accordingly. Whatever lofs the Defendant may have fuftained by the interruption of the direct courfe of exchange, I think the contract capable of no other conftruction, and that the Plaintiff is entitled to the larger fum.

1803. POLLARD v. HARRIS.

Verdict to be entered for the Plaintiff for 40*l.* 6*s.* 10*d.*

MANNERS *qui tam* v. POSTAN.

Feb. 4th.

In an action on the ftatute of ufury for taking more than legal intereft on a loan of money "from the 15th of *April* to the 14th of *July* 1802," the Court will amend the verdict by the Judge's notes if the jury, by miftaking the date of an inftrument, create a variance for which the evidence affords no foundation. If more than legal intereft be taken for forbearance on a note given to *A.* by *B.* as a collateral fecurity for money lent to *C.*, fuch ufury is well defcribed to be for forbearance of money *lent* by the Defendant to *B.*

THIS was an action on the ftatute of ufury. The 1ft count of the declaration ftated that the Defendant on the 5th of *Auguft* 1802, by means of a corrupt contract made between the Defendant and one *Richard Lowe*, "took, accepted, and received of and from the faid *Richard Lowe* 5*l.* for the forbearing and giving day of payment, and for the having forborne and given day of payment to the faid *Richard Lowe* 50*l.* lent by the Defendant to the faid *Richard Lowe* on the 15th of *April* 1802, from the faid time of the faid lending of the faid 50*l.* until the 14th of *July* 1802." There were feveral other counts not material to be here ftated. The caufe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laft *Michaelmas* term, when it appeared that the Plaintiff being indebted to one *Dance* in the fum of 111*l.* 10*s.* gave a warrant of attorney to fecure that fum, and that *Richard Lowe* alfo gave his note for the fame fum, dated the 12th *October* 1801, payable to *Dance* or order at fix months, as a collateral fecurity, which became due on the 15th of *April* 1802; that this note was indorfed by *Dance* to the Defendant; that on the 12th or 13th of *April Richard Lowe* applied to the Defendant's

1803.
MANNERS v. POSTAN.

son to accept 61*l.* 10*s.* in part payment, and a warrant of attorney at three months for the remainder, for which indulgence and the expences he offered three guineas; that the proposal being accepted, *Richard Lowe* paid 64*l.* 14*s.* (*a*), and gave the warrant of attorney, at the same time asking for his note and the former warrant of attorney given by the plaintiff, which the Defendant's son promised to send, but stated that they were at that time in his father's possession; that on the 15th of *April* one *Thomas Gale* called on *Richard Lowe* from the Defendant, and returned the 64*l.* 14*s.* and the warrant of attorney for 50*l.*, stating that the Defendant objected to what had been done, but afterwards produced a blank warrant of attorney for 55*l.*, dated the 14th of *April*, which he requested *Richard Lowe* to execute, and in case of his non-compliance threatened that the Defendant would proceed upon the note; and that *Richard Lowe* accordingly again paid the 64*l.* 14*s.* and executed the last-mentioned warrant of attorney, which was paid on the 5th of *August* in the same year. The jury found a verdict for the Plaintiff, stating that the Defendant took 5*l.* for the use of 50*l.* from the *14th of April* to the 14th of *July*.

On a former day a rule *nisi* was obtained, calling upon the Defendant to shew cause why the above general verdict should not be amended by the Judge's notes, and why it should not be entered on the 1st count of the declaration only, and at the same time another rule *nisi* was obtained, calling upon the Plaintiff to shew cause why a nonsuit should not be entered on the ground that the evidence did not support the averment in the 1st count of the declaration that the usurious interest was taken for the forbearance of money lent.

Shepherd Serjt. for the Defendant now contended, 1st, that in order to support the present action it was essential that the contract should be found as stated in the declaration; and that as there was a material variance between the finding of the jury and the transaction as pleaded, the Court could not enter a verdict for the Plaintiff upon the presumption that the jury had proceeded upon a mistake; that although it appeared in evidence that the warrant of attorney was executed on the 15th of *April*, yet as the jury had found that the usurious interest was taken "for the use of 50*l.* from the 14th of *April* to the 14th of *July*," it must be presumed

(*a*) This sum exceeds what was intended to be advanced by 1*s.* only, because the Defendant's son had no charge.

that

1803. MANNERS v. POSTAN.

that the intereſt was computed from the 14th of *April*, which would vary the tranſaction moſt eſſentially from that ſtated in the declaration; and that although it had been uſual to ſet right the miſtake of a jury by the Judge's notes where the verdict was general, yet that where the jury had found a particular fact incorrectly, there was no means of rectifying that miſtake but by ſending the caſe to a new trial. 2dly, That no money was ever lent by *Poſtan* to *Lowe*, as averred in the declaration; for that the uſurious intereſt was taken for the forbearance of 50*l.* due upon a promiſſory note which *Lowe* had given as a collateral ſecurity for the debt of a third perſon, which could not conſtitute a loan from the Defendant to *Lowe*.

Marſhall Serjt. for the Plaintiff inſiſted, 1ſt, That where a manifeſt miſtake occurred in the finding of the jury, the Court would of courſe rectify that miſtake by the Judge's notes; and obſerved, that ſuch amendment had been allowed even in a ſpecial verdict; that in the preſent caſe there was no evidence whatever from which the jury could have preſumed that intereſt was calculated from the 14th of *April;* that the note itſelf did not become due till the 15th; and that it was evident the jury had been miſled by the circumſtance of the warrant of attorney having borne date as of the 14th. 2dly, That as the Defendant was entitled to receive 50*l.* from *Lowe* on the 15th of *April*, which he then agreed ſhould remain three months longer in the hands of *Lowe*, it was equivalent to a loan of that ſum. He cited *Floyer* v. *Edwards*, *Cowp.* 112. where Lord *Manſfield* expreſſed a clear opinion, that if a tranſaction be in ſubſtance a loan, it muſt be conſidered as ſuch whatever may be the form of the tranſaction.

The Court were clearly of opinion, that, as there was no evidence from which it could have been inferred that intereſt was computed from the 14th of *April*, the verdict might be entered according to the notes of the Judge, without exceeding the line which had been already adopted in caſes of this ſort: though if any evidence had been given from which it would have been competent for the jury, had they believed it, to have found as they had done, the Court could not have rectified the miſtake, but muſt have granted a new trial. With reſpect to the 2d point, they thought the tranſaction was equivalent to a loan of money, and referred to *Wade q. t.* v. *Wilſon*, 1 *Eaſt*, 195.

Rule abſolute for the amendment.
Rule diſcharged for the nonſuit.

Feb. 11th.

Lord Northwick *v.* Stanway.

If there be a custom within a manor for a lord to grant parcels of the waste by copy of court-roll, the premises granted in the above mode are well described as copyhold premises, though the date of the grant be modern. If an assessment of a copyhold fine be entered in the court-rolls as of 100*l*, but that out of especial favour the lord remitted 40*l*. and thereby reduced it to 60*l*., and the lord sue for the fine, and the jury, finding the annual value of the premises 30*l*., give a verdict for 60*l*, the lord cannot retain the verdict for the sum actually due, but must make a new assessment, the old assessment, notwithstanding the remitter, being in law an assessment as of 100*l*.

Indebitatus assumpsit. The 1st count stated, "that the Defendant on, &c. was indebted to the Plaintiff, then and still being lord of the manor of *Harrow*, otherwise *Sudbury*, in the county of *Middlesex*, in 200*l*. for reasonable fines due and payable by the Defendant to the Plaintiff for and on his admission, according to the custom of the said manor, into divers copyhold tenements, with the appurtenances, parcel of the said manor, into which he had by the Plaintiff, before that time and whilst he was lord of the said manor, been admitted according to the custom of the said manor, to hold the same, with the appurtenances, to the Defendant, his heirs and assigns, by copy of court-roll, at the will of the lord and according to the custom of the said manor." There were other counts for money paid, had, and received, and on an account stated. The Defendant pleaded the general issue.

At the trial before Lord *Alvanley* Ch. J. at the *Westminster* Sittings after last *Michaelmas* term, it appeared that the premises for which the fine was claimed were some time since parcel of the waste of the manor, and were first granted by the then lord to hold by copy of court-roll; that within the manor there was a custom for the lord to grant parcels of the waste whenever he should think proper, to hold by copy of court-roll; that there were many tenements within the manor which had been holden immemorially by copy of court-roll, and many which had been granted in the above manner out of the waste, the one being called ancient copyhold and the other waste-hold copyhold, and that the tenants of the former were entitled to some privileges to which the tenants of the latter were not entitled; that upon the Defendant's admission, the following entry was made upon the rolls; "And the lord of the manor assessed a fine of 100*l*. for his admission to the said premises, but out of especial grace remitted 40*l*. thereof, which has reduced the fine to 60*l*." The jury found that the annual value of the premises was 30*l*. and gave a verdict for the Plaintiff for 60*l*. being two years annual value.

Shepherd Serjt. on a former day moved for a rule calling on the Plaintiff to shew cause why a nonsuit should not be entered; 1st, because the premises on which the fine was claimed ought not to have been described as copyhold; he insisted that it was of the essence of copyhold tenure that the premises should have been demised and

demiseable

demiseable by copy of court-roll from time immemorial; whereas it appeared in the present case that the premises had been parcel of the waste within time of memory, and that although a custom might have existed within the manor for the lord to grant tenements out of the waste, upon admission to which a fine might be demandable by virtue of the custom, yet that in declaring for such fine the nature of the tenure should have been correctly stated in the declaration; 2dly, because the assessment by the lord being 100*l.*, which the finding of the jury had proved to be too heavy a fine, the lord's right to recover could not be complete until a new assessment had been made; for although it appeared that out of especial favour he had remitted 40*l.* and reduced the fine to 60*l.*, still the fine must be considered as a fine of 100*l.* and assessed as such, though the payment had been remitted in part. On this point he cited *Astle v. Grant*, *Doug.* 731. *n.* 4. ed. 3.

With respect to the 1st point, *The Court* observed, that although the premises in question had been newly granted by copy of court-roll, yet that having been granted by virtue of an immemorial custom to demise parcels of the waste as copyhold, they were to be considered as much copyhold tenements as if they had been immemorially holden by copy of court-roll; that the tenure had its foundation in custom, which had immemorially attached upon the waste, the subject of the grant; that copyholds of a similar description to those in question were very common in the North of *England*, and had often been recognised in judicial determinations; and *Chambre* J. added, that within his recollection tenures of this kind had been judicially acknowledged at *Durham*, and in some instances the question had been raised in such a mode that it might have been removed from the court there to *Westminster-hall*, if the counsel had not been satisfied with the propriety of the determination. With respect to this point (*a*), therefore, it was intimated by the Court, that unless a strong opinion to the contrary was entertained at the bar, they did not wish to have it agitated (*b*); but on the 2d point granted a rule *nisi*.

(*a*) This point very ably discussed by Mr. *Watkins* in his treatise on *Copyholds*, p. 33. to p. 36., and the several authorities on the subject are there collected by him in the notes; from those authorities, and particularly from *Co. Litt.* 58. *b.* it is clearly shewn that land need not immemorially have been *demised* as copyhold, though it must have been *demiseable* as such. Mr. *Watkins*, indeed, seems to think that even without the aid of a custom, the lord of a manor may grant the waste of the manor as copyhold, and thereby effectually create a new copyhold tenure.

(*b*) On a subsequent day *Shepherd* abandoned this point.

Best

1803.
Ld. Northwick v. Stanway.

Best Serjt. now shewed cause, and contended that, as the lord had demanded no more than 60 *l.*, which appeared by the finding of the jury to be two years' value, he was entitled to recover; that it appeared from *Titus* v. *Perkins*, *Skin.* 249. that if a lord demand more than he ought he may make his demand *de novo*, and that the entry upon the rolls in this case shewed that although the lord assessed the fine at 100 *l.* he only intended to insist upon 60 *l.*; that this entry could never prejudice the tenant, since it would afford no evidence that two years' value amounted to 100 *l.* for that a copyhold fine is at all times an arbitrary fine in point of form, though it is now settled that the lord cannot take more than two years' value; and that the 100 *l.* therefore might always be deemed the formal fine imposed by the lord, and the 60 *l.* the two years' value on which he had a right to insist.

The Court, however, (a) (without hearing *Shepherd*,) were of opinion that the assessment was an assessment of 100 *l.*, and that the latter part of the entry was nothing more than a remission of the payment of part of that assessment, and that much mischief might arise to copyholders if similar entries were permitted to be made upon the court-rolls of manors.

Rule absolute.

(a) Mr. Justice *Heath* was absent on this day, but was present when the 1st point was moved and considered.

Feb. 12th.

Cobb *v.* Bryan.

If to an avowry for 120 *l.* rent in arrear the Plaintiff plead "that the said 120 *l.* is not due," and the defendant join issue thereon, and at the trial it appears that 24 *l.* only is due, upon which the Plaintiff objects that the evidence does not support the issue joined by the Defendant; yet if a verdict be taken for 24 *l.* subject to the opinion of the Court, such finding will cure the defect in the formality of the issue.

REPLEVIN. The Defendant avowed for rent of certain apartments in a dwelling-house demised by him to the Plaintiff, at the yearly rent of 24 *l.*, payable quarterly, and because 120 *l.* of the rent aforesaid "due and payble by the Plaintiff to the avowant for five years ending and ended on the feast-day of the Annunciation 1802," was in arrear, the goods mentioned in the declaration were distrained. The Plaintiff pleaded in bar, 1st, that he did not enjoy the said apartments for the said five years under the said demise; 2dly, that he did not hold the said apartments at the rent aforesaid; 3dly, "that the said 120 *l.* of the rent aforesaid were not due and payable by the Plaintiff to the avowant for five years

ending and ended on the said feast-day of the Annunciation of the Blessed Virgin *Mary* in the year 1802 aforesaid, in manner and form as the said avowant hath in and by his said avowry also above alleged;" and, 4thly, "that the said 120 *l.* of the rent aforesaid in the said avowry of the said Defendant in this behalf above alleged to have been due and payable by the Plaintiff to the avowant for five years of the said term ending and ended on the said feast-day of the Annunciation of the Blessed Virgin *Mary* in the year 1802 aforesaid were not in arrear and unpaid to the avowant at the said time when, &c. in manner and form as the avowant hath in and by his said avowry also above alleged." On each of these four pleas issue was joined.

At the trial of this cause before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Michaelmas* term, it being proved that 24 *l.* only was due for rent, it was objected on the part of the Plaintiff that such evidence did not support the 3d and 4th issues, and consequently the Plaintiff was entitled to a verdict on those issues. His lordship being disposed to reserve this point, a verdict was taken for the avowant on all the issues for 24 *l.*, with liberty to the Plaintiff to move to enter a verdict for himself on the 3d and 4th issues.

Accordingly a rule *nisi* for that purpose having been obtained on a former day,

Bayley Serjt. now shewed cause. Under an avowry for a larger sum the avowant may well have a verdict for a less sum, as was the case in *Harrison* v. *Barnby*, 5 *T. R.* 246. It is true in that case the issue was that the said rent, *nor any part thereof*, was in arrear. But where issue is taken on a collateral point it is sufficient if the party join with his adversary without adding any thing to it, as was said by *Coke* in *Robsert* v. *Andrews*, *Cro. Eliz.* 82., who admitted that in an action of waste for cutting twenty oaks, the Defendant ought to plead that he did not cut the said twenty oaks, or any of them; but observed, that in debt upon an obligation that he shall do no waste, and a breach assigned that he cut twenty oaks, it is sufficient to plead that he did not cut the said twenty oaks, *modo et formâ*, &c. Which instances shew the distinction, for in the latter case the issue respecting the twenty oaks is only collateral, whereas in the former case it is the direct issue between the parties. In *Dyer*, 115. *b.* the same distinction is taken, and

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1803. COBB v. BRYAN.

though the judgment of the Court is not reported there, yet in *Co. Litt.* 282. *a.* the last case is stated with a reference to *Dyer*; and since Lord *Coke* adds, "judgment shall be given for the Plaintiff, for sufficient matter of the issue is found for the Plaintiff," such, it may be presumed, was the judgment of the Court. Indeed in *White* v. *Bodinam*, 2 *Salk.* 629. in covenant by lessee against lessor, for that he entered upon him and ousted him from the premises; the Defendant pleaded that he entered to distrain for rent, *absque hoc* that he ousted Plaintiff *de præmissis*; to which plea there was a demurrer, because it omitted to allege "or any part thereof;" but the Court held the plea well enough, saying, if the Plaintiff will join issue upon the matter of the traverse, and prove the ouster of any part, the issue shall be for him. In that case, therefore, the Court gave effect to the distinction alluded to, even upon demurrer, whereas the objection in this case comes after verdict; at which period the Court may imply the words "or any part thereof," and thereby remove all possible doubt. Again, in *Waltham* v. *Sparkes*, 1 *Ld. Raym.* 41., in debt on an indemnity bond to a parish, and a plea of *non damnificatus*, the replication alleged that 2*s.* had been paid by the parish, and that 8*d.* of that sum was for the maintenance of the pauper; and then the Defendant in his rejoinder traversed that 8*d.* was for the maintenance of the pauper; on demurrer it was objected that the traverse was too narrow, not having the words "or any part thereof," but the Court held it good enough. If a material allegation is traversed in an improper or inartificial manner, the issue taken upon it is merely an informal one, and is aided after verdict. This appears from the opinion of Lord *Hale* in *Bennet* v. *Holbeck*, 2 *Saund.* 317. and *note* 6. to that case by Mr. Serjt. *Williams*. The Judge and jury in this case, therefore, had a right to sever the material from the immaterial matter put in issue, and to find accordingly; and, having done so, the Court will not after verdict hold that to be one entire allegation which at the trial has been considered *distributivè*.

Williams Serjt. in support of the rule. Many of the cases cited do not apply to the present: and indeed it is very questionable whether at this day the case of *Robsert* v. *Andrews* can be sustained as law. The question here arises upon an avowry, which is in fact a declaration, both parties in replevin being actors, and either being at liberty to take down the record. This being so, the allegation

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that 120*l.* was not due is not a collateral but a direct issue. The addition of the words "or any part thereof" to the avowry in *Harrison* v. *Barnby* completely distinguishes the two cases: for though under general words the precise sum may be proved, yet in this case there are no general words to admit of that proof. With respect to *Bennet* v. *Holbeck*, the day and place were made parcel of the issue; and therefore, though there was an informality in the plea which would have been bad upon demurrer, yet it was aided after verdict. The words "*de præmissis*" in *White* v. *Bodinam* include the whole and every part: it was not therefore necessary to enter into the question respecting direct and collateral issues. Notwithstanding the jury have in this case found a verdict for the avowant, yet the case is to be considered as if it came before the Court upon demurrer: for it was objected at the trial that the issues were not proved; and the verdict was only taken *pro formâ*, reserving it for the opinion of the Court, whether it ought to have been so taken. The case of *Osborn* v. *Rogers*, 1 *Saund.* 267. is a precise authority applicable to the present case. There, on *assumpsit* for service from the 21st of *March* 1647 to the 1st of *November* 1664, the Defendant pleaded that the Plaintiff served from the said 21st of *March* to the 31st of *December* 1758, and then left the service: and traversed that he served till the said 1st of *November*, which traverse was held bad, because if the Plaintiff had taken issue upon it he would have been bound to prove the service for the whole time or he could have recovered nothing; whereas if he had in fact served for any part of the time he ought to recover *pro tanto.* So also in *Rex* v. *Kilderby*, 1 *Saund.* 311., which was an indictment for using the trade of a woollen-draper for three months not having served an apprenticeship thereto, the Defendant traversed the using of the trade for three months; and *Saunders*, at the end of the case observes, that the plea was bad on that ground, since it ought to have gone to every part of the time distributively: for if the Defendant had used the trade only one month, and the traverse had been rightly taken, he ought to have been convicted. In *Goram* v. *Sweeting*, 2 *Saund.* 206., to *assumpsit* on a policy of insurance for a loss by perils of the sea, the Defendant traversed that the ship *and* tackle, &c. were lost: to which there was a demurrer, the objection being that the traverse should have been in the disjunctive, and of this opinion was the Court. In addition to

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1803.

COBB v. BRYAN.

the above cases may be cited *Colborne* v. *Stockdale*, 1 *Str.* 493., where to debt on bond conditioned for the payment of 1550*l.*, the Defendant having pleaded that part of the sum, *viz.* 1500*l.*, was won by gaming, and therefore the bond was void, the Plaintiff traversed that the 1500*l.* was won by gaming, which was held bad; for it was not necessary that so much should be won, but if any less sum for which the bond was given had been won by gaming the bond would be equally void. The same principle was adopted on demurrer in *Palmer* v. *Ekins*, 2 *Str.* 817. and *Brown* v. *Johnson*, 2 *Mod.* 145.

Lord ALVANLEY Ch. J. I do not see upon what principle it can be contended that those matters which are aided by the finding of the jury are to be considered as not found by the jury, because an objection was taken previous to the finding. The reason upon which such matters are considered as aided appears to me to be that the substance of the issue is found, and therefore any informalities in the issue shall not be regarded. The principal question in this case is, Whether the defect in these pleadings can be taken advantage of after verdict? There are many issues to which a party may demur if he think proper, and yet if he choose to go on to trial, he may, nevertheless, take advantage of the fault after verdict: as where an issue is completely immaterial; for no verdict can cure that defect. The issue in this case in form is, Whether 120*l.* be due or not? The Plaintiff having insisted upon that in his plea which is no answer to the avowry, namely, that 120*l.* is not due, and the avowant having joined issue upon that fact, it appears that 120*l.* is not due, but that a less sum is due, and we are to determine whether the Plaintiff shall be permitted to take advantage of his own bad pleading. If this had been an issue sent from the Court of Chancery to try whether 120*l.* were due or not, there must have been a verdict for the Defendant. In this case, however, where the substance of the issue is to ascertain whether any rent was in arrear, and the jury have found that 24*l.* were due, I see no reason, in the absence of any precedent precisely in point, why the avowant should be precluded from having the benefit of that finding. The objection is on the record, and may be moved again either in arrest of judgment or upon a writ of error.

ROOKE

1803. COBB v. BRYAN.

ROOKE J. (a). The cafes cited by my Brother *Bayley* have fatisfied me that the verdict, as found, may be fupported. If the Plaintiff be diffatisfied with our opinion, the point, being on the record, will be open to him in another court.

CHAMBRE J. If the argument of my Brother *Williams* were to prevail, we ought to grant a repleader; for in that cafe the real queftion between the parties would not have been decided by the finding of the jury. This defect, however, appears to me to be aided by the ftatute of jeofails, for the fubftance of the iffue is rightly found.

Rule difcharged.

(a) *Heath* J. was abfent.

END OF HILARY TERM.

CASES

1803.

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

AND

In the HOUSE of LORDS,

IN

Easter Term,

In the Forty-third Year of the Reign of GEORGE III.

(IN THE HOUSE OF LORDS.)

April 16th.

The Inhabitants of the County of CUMBERLAND *v.* Our Sovereign Lord the KING, in Error.

The 1 *Anne*, c. 18. *s.* 5. has not taken away from the crown the power of removing by *certiorari* an indictment for not repairing a county bridge. *Quære*, Whether the same persons who are bound to repair a bridge are also bound to widen it, if the exigencies of the public should require?

THE record in this case stated, that at the general sessions of oyer and terminer of our lord the king, held at *Carlisle*, in and for the county of *Cumberland*, on the 26th of *August*, 31st *George* the Third, an indictment was preferred and found, wherein it was presented as follows; that is to say, The jurors for

our

1803. The Inhabitants of the County of CUMBERLAND v. The KING, in Error.

our lord the king, upon their oath, present that there is a certain common public bridge called *Blennerhasset-bridge*, situate upon the river *Ellen*, at the parish of *Torpenhow* in the said county of *Cumberland*, in the king's common highway, leading from the village of *Aspatria* in the county of *Cumberland*, towards and unto the market town of *Ireby* in the said county, used for all the liege subjects of our said lord the now king and his predecessors by themselves, and with their horses, coaches, carts, and carriages, to go, return, pass, ride, and travel upon, and over, at their will and pleasure, freely and safely, without any obstruction, hindrance, or impediment whatsoever; and that the said common public bridge on the 20th day of *August*, in the 31st year of the reign of our sovereign lord *George* the Third, king of *Great Britain*, and so forth, and continually afterwards until the day of the taking of this inquisition, was, and yet is broken, ruinous, and in decay, for want of due reparation and amendment of the same; and the said common public bridge, during all the time last mentioned, was, and yet is *over narrow*, and the battlements of the same bridge were not, nor yet are of a *sufficient height* to guard and preserve the said subjects of our said lord the king, passing, riding, and travelling upon and over the said bridge from going and falling over the said battlements into the said river *Ellen*, by reason whereof the said liege subjects of our said lord the king, necessarily going, returning, passing, riding, and travelling upon and over the said common public bridge, by themselves and with their horses, coaches, carts, and carriages, during all the time last mentioned, could not, nor yet can go, return, pass, ride, and travel upon and over the said common public bridge so freely and safely as they ought to do; but were, and yet are greatly obstructed, stopped, and hindered, in the going, returning, passing, riding, and travelling upon and over the same common public bridge, and during all the time aforesaid were, and yet are in great peril, hazard, and danger of going, riding, and falling over the said battlements of the said common public bridge into the said river *Ellen*, and of being there suffocated, drowned, and killed in the same, and of losing and spoiling their goods and wares, to the great damage and common nuisance of all the liege subjects of our said lord the king, upon and over the said common public bridge, going, returning, passing, riding, and travelling, against the form of the

 statutes

1803.

The Inhabitants of the County of CUMBERLAND v. The KING, in Error.

ſtatutes in that caſe made and provided, and againſt the peace of our ſaid lord the king, his crown and dignity, and that the inhabitants of the county of *Cumberland* of right ought to repair and amend the ſaid common public bridge, ſo as aforeſaid being broken, ruinous, *over narrow*, and in decay, and the battlements thereof not being of *a ſufficient height*, and to make the ſame ſafe and ſecure for the ſaid ſubjects, whenever and as often as it becomes neceſſary.

Which ſaid indictment our ſaid lord the king afterwards, for certain reaſons, cauſed to be brought before him, to be determined according to the law and cuſtom of *England*, and two of the inhabitants of the ſaid county having appeared and pleaded thereto the general iſſue, and put themſelves upon the country, and the king's coroner and attorney having done the like, and iſſue being joined, the ſaid indictment came on to be tried at the aſſizes held at the city of *Carliſle* on the tenth day of *Auguſt* 1792, before *Thompſon* B., by a jury of the county of *Cumberland*, when the Plaintiffs in error were found guilty of the premiſes charged upon them by the ſaid indictment, in manner and form as by the ſaid indictment was alleged. Whereupon in *Trinity* Term 1795 (*a*), the Court gave judgment, and adjudged that the Plaintiffs in error for the treſpaſſes, contempts, and nuiſances whereof they were indicted and convicted as aforeſaid, ſhould pay a fine of three hundred and fifty pounds, and that the ſaid fine ſhould be levied and paid into the hands of the treaſurer of the ſaid county, to be applied purſuant to the direction of the ſtatute in ſuch caſe made and provided.

On this judgment the plaintiffs brought a writ of error, and aſſigned the following errors: 1ſt, That by the record aforeſaid it appeared that the ſaid inhabitants of the ſaid county of *Cumberland* were indicted and convicted, not only for that the ſaid common public bridge in the ſaid indictment mentioned, was broken, ruinous, and in decay, for want of due reparation and amendment of the ſame, but alſo for that the ſaid common public bridge was over narrow, and the battlements of the ſame bridge were not of a ſufficient height to guard and preſerve the ſubjects of our ſaid lord the king, paſſing, riding, and travelling upon and over the ſaid bridge, from going and falling over the ſaid battlements into

(*a*) See the caſe reported, 6 *T. R.* 194.

 the

the ſaid river *Ellen*, although no obligation was, or is laid or charged upon the ſaid inhabitants of the ſaid county of *Cumberland* in or by the ſaid indictment, nor are they by law bound to widen the ſaid bridge, or to raiſe or heighten the battlements thereof. 2d, That by the record aforeſaid it appears that our ſaid lord the king, for certain reaſons, cauſed the ſaid indictment to be brought before him to be determined, and that the ſame was accordingly determined in and by the ſaid court of our ſaid lord the king, before the king himſelf, although by law, and according to the form of the ſtatute (*a*) in ſuch caſe made and provided, the ſaid indictment ought not to have been removed out of the ſaid county of *Cumberland* into the ſaid court of our ſaid lord the king, before the king himſelf, but ought to have been determined in the ſaid county of *Cumberland*, and not elſewhere. 3d, For that the judgment aforeſaid, in form aforeſaid given, appears to have been given for our ſaid lord the king againſt the ſaid inhabitants of the ſaid county of *Cumberland;* whereas by the law of the land the ſaid judgment ought to have been given for the ſaid inhabitants of the ſaid county of *Cumberland*, and they ought to have been acquitted of the premiſes in the ſaid indictment mentioned.

The king's coroner and attorney thereupon rejoined that there was no error in the ſaid indictment and record, which the plaintiffs inſiſted that there was, and humbly hoped that the judgment of the Court of King's Bench would be reverſed for the following amongſt other reaſons:

1ſt, Becauſe the judgment given for ſo large a fine as three hundred and fifty pounds was given, not for the purpoſe of being laid out in or towards repairing the bridge according to its ancient immemorial limits, form, and conſtruction, for that would not have required more than five pounds, but for the purpoſe of entirely pulling down the old bridge and making a new one wider than the preſent one, upon a ſuppoſition that the preſent bridge was too narrow for the public convenience, and upon this principle, that perſons bound to the repair of public bridges are by

(*a*) 1 *Anne*, c. 18. ſ. 5. which provides "that all matters concerning the repairing and mending of the bridges and highways hereinbefore mentioned, ſhall be determined in the county where they lie and not elſewhere; and that no preſentment or indictment for not repairing ſuch bridges, or the highways at the end of ſuch bridges, ſhall be removed by *certiorari* out of the ſaid county into any other court."

1803.

The Inhabitants of the County of CUMBERLAND v. The KING, in Error.

law bound to make new bridges larger and wider than the old ones, if the convenience of the public should call for it. This principle is new, and, it is submitted, is not warranted by law; the legal obligation is only to repair and amend the existing bridge from time to time as occasion may require, not to enlarge or widen it from time to time as the public convenience may require. Such an extension of the obligation would be extremely burthensome and oppressive upon persons bound to the repairs of bridges, and particularly to individuals who may be bound by reason of the tenure of lands to repair public bridges, and the law must operate equally upon them as inhabitants of a county or district. The law having furnished no means by which persons bound to the repair of bridges are enabled to acquire land to widen such bridges upon, and the acts of the legislature in many instances, for rebuilding bridges upon more commodious constructions for the public, and in consideration thereof authorising tolls to be taken, are strong proofs to shew that the obligation imposed by law in this case does not go to the extent upon which the Court of King's Bench have proceeded in giving the said judgment.

2d, The statute 1 *Ann. stat.* 1. *c.* 18. *s.* 5. expresly enacts, that all matters concerning the repairing and amending of bridges and highways shall be determined in the court where they lie and not elsewhere, and that no presentment or indictment for not repairing bridges, or highways at the ends of bridges, shall be removed by *certiorari* out of the said county into any other court. The prohibition of removal is general and without any distinction, whether the *certiorari* is sued out at the instance of the prosecutor or the defendants; and therefore the removal of the present indictment is contrary to the statute, let it be sued out at whose instance it might; but it does not even appear by the record at whose instance it was sued out. There was no purpose of public utility to be answered by the removal, because it was sent down to be tried in the county of *Cumberland*, and appears by the record to have been tried by a jury of that county. If that was wrong, it is another ground of error appearing on the record, though not specially assigned.

T. Erskine.
G. Wood.

The

The king's coroner and attorney hoped that the judgment would be affirmed for the following amongst other reasons:

1st, The obligation upon the inhabitants of a county to repair public bridges is an obligation of common right founded on public necessity and convenience. It is essential to the performance of it that there should be no obstruction to the passage of the king's subjects, where the right of passage extends to carriages; the bridges must necessarily be sufficient for such carriages as the public have a right to travel with, and are in common use; and it would be against principles of public policy, and be a restraint to commerce and agriculture, if the use of improved modes of conveying goods and merchandize could not be adopted upon the public high roads of the kingdom. It is also essential to the performance of the obligation that the king's subjects may pass with safety as well to their persons as their goods, and the danger in these respects to those who have occasion to use the right of passage is the common averment in all indictments of highways and bridges. The obligation to repair is not confined in all cases to the precise limits of the existing bridge. The public exigency, and the free and secure passage is at all events to be provided for, and if the water changes its course the bridge must be accommodated to that change.

2d, The objection to the removal of the record by *certiorari* rests solely on the generality of expression in a clause in the stat. 1 *Ann. stat.* 1. *c.* 18. *f.* 5. but in very many instances the crown is not bound by general words in an act of parliament, and especially where no particular intent appears that it should be so bound. It would be against the plain intent of the statute so to construe the language of this clause, the manifest object of which is to prevent defendants from obstructing justice by unnecessary delay and expence, and not to restrain the discretion of the mode of prosecution. In the particular instance of statutes taking away the right of removing indictments by *certiorari* it is laid down as a general rule, that the crown is not bound by general words; and the statute upon which the present question depends has been so construed by the uniform course of practice, commencing almost immediately after the passing of the act, and continued to the present times, as appears by a great number of precedents referred to in the report

1803.

The Inhabitants of the County of CUMBERLAND v. The KING, in Error.

of a decision of the Court of King's Bench upon this point in this prosecution. There is no judicial precedent to the contrary.

Edward Law.
A. Chambre.

On this day *Erskine* and *Wood* were heard at the bar of the House for the Plaintiffs in error (*a*).

The Lord Chancellor (*b*) then put two questions to the Judges; 1st, Whether upon this record the House could enter into the general question whether the county was bound to widen bridges according as the public exigency or change of circumstances might require; or whether after a general verdict it must not be presumed that the over-narrowness mentioned in the indictment arose from the bridge by some cause or other having been contracted from its ancient width? And his Lordship observed, that if the Judges should think so, it would be unnecessary to hear any further argument as to the general question which would remain undecided, and as to which, he added, he entertained considerable doubts. 2d, Whether the *certiorari* was taken away by the general words of the statute? And his Lordship intimated his own opinion that it was the prerogative of the king to issue his *certiorari;* and that the general words of the statute had not taken away the *certiorari* at the instance of the crown, but only that which issued at the instance of the party.

MACDONALD Ch. B. delivered the opinion of the Judges present (*c*), first that upon this record the general question was excluded, since it must be presumed after verdict that the over-narrowness of the bridge had been occasioned either from some addition having been made to the inside of the battlements or from some other cause, by which the ancient width of the bridge had been contracted; and secondly, that the *certiorari* was not taken away by the general words of the statute.

Accordingly the judgment of the Court of King's Bench was affirmed.

(*a*) *Garrow* and *Holroyd* were to have argued *e contrà*.

(*b*) Lord *Eldon*.

(*c*) *Hotham* B., *Heath* J., *Thompson* B., *Rooke* J., and *Graham* B.

7

JENNINGS Demandant, STREET Tenant, and MARY VERNON, WILLIAM CROSS and ELEANOR his Wife, and GRACE JENNINGS VERNON, Vouchees. April 28th.

If the different vouchees in a recovery execute and acknowledge several warrants of attorney, though upon the same piece of parchment, the Court will not suffer the recovery to pass.

IN this case *Mary Vernon* and the other vouchees residing at a considerable distance from each other, and two captions therefore being necessary, two separate warrants of attorney upon the same piece of parchment, with a caption at the foot of each, were taken, one from *Mary Vernon*, and the other from the remaining vouchees.

It being objected by the officers, that as the voucher was to be joint, one warrant of attorney with two captions should have been taken,

Best Serjt., in order to amend this error, now moved that the names of *William Cross* and *Eleanor* his wife, and *Grace Jennings Vernon* might be inserted immediately after the name of *Mary Vernon* in the first warrant of attorney, and that the other warrant might be struck out, and both the captions be considered as relating to the amended warrant of attorney. He observed that if the Court should find any difficulty in allowing the amendment proposed, still they might suffer the recovery to pass in its present shape, the objection being merely formal; for that the two warrants of attorney upon the same piece of parchment in substance amounted to a joint warrant of attorney by all the parties.

But *The Court* were clearly of opinion that they could not make the proposed amendment, and also that the recovery could not pass in its present shape, for that notwithstanding all the vouchees had appointed the same attorney, yet that it did not follow from thence but that he might be appointed by the different parties for separate purposes.

Best took nothing by his motion (*a*).

(*a*) See *Balch v. Phelps*, *post*, p. 366.

1803.

April 29th.

Thornton v. Merredew.

Where the Defendant suffers judgment by default in an action of debt on simple contract, the Plaintiff is not entitled to levy the expences of the execution, notwithstanding those expences, together with the debt and costs of the action, do not exceed the sum confessed upon record.

JUDGMENT by default having been suffered in an action of debt on simple contract, the plaintiff took out execution, and levied not only for the debt and costs, but also for the expences of the execution.

Cockell Serjt. having obtained a rule calling on the Plaintiff to shew cause why the costs of the execution should not be restored to the Defendant,

Marshall Serjt. shewed cause, and contended that as the Defendant had confessed the whole sum mentioned in the declaration, by suffering judgment to go by default, the Plaintiff was entitled to levy not only for the debt and costs of the action, but also for the costs of the execution, provided the whole amount did not exceed the sum stated in the declaration and confessed upon record. He urged that in debt on bond with a penalty the costs of the execution are always taken, and that the debt on record in the present case might be considered in the same light as the penalty of the bond, the larger sum in both cases standing as a security for all that is *bonâ fide* due.

But *The Court*, after referring to the officers, were clearly of opinion that in debt on simple contract the Plaintiff was not entitled to the costs of the execution.

Rule absolute.

April 29th.

Phillips Demandant v. Jones and Others Deforciants.

If one of the deeds to lead the uses of a fine, *viz.* the lease, contain the word "tithes," but the other deed, *viz.* the release, omit that word, the Court will not amend the writ of entry by inserting the word "tithes," though the release has the words, "and also all houses, ways, &c. hereditaments and appurtenances whatsoever, to the said messuages, lands, &c. belonging or in any way appertaining."

WILLIAMS Serjt. moved to amend the writ of entry in a fine by inserting the word "tithes." To warrant this amendment he produced the deeds to lead the uses, which were a lease and release, in the former of which the word "tithes" was mentioned, but in the latter, after the description of the lands were these words only, "and also all houses, ways, &c. hereditaments and appurtenances whatsoever, to the said messuages, lands, &c. belonging or in any way appertaining." He referred to the case of *Dowse* v. *Reeve*,

v. Reeve, ante, vol. 2. p. 578. where a similar amendment was allowed upon the ground of the word "hereditaments" being used in the deed to lead the uses.

1803. PRITCHARD v. JONES and Others.

But *The Court* observed that the release did not convey all the hereditaments described in the lease, but only the hereditaments belonging to the messuages and lands before described in the release itself, and that tithes were not hereditaments belonging to land, but were a separate subject of tenure, and must be held by a different title.

Williams took nothing by his motion.

CLARK and Others, Executors of MOLES, *v.* DEVLIN.

May 2d.

If the holder of a bill of exchange, of which payment has been refused, inform the drawer of his intention to take security from the acceptor, and the drawer answer, that he may do as he likes, for that he (the drawer) is discharged for want of notice, and it appear that due notice had been given; the holder may sue the drawer notwithstanding that he has taken security from the acceptor, for the drawer under such circumstances must be considered as having assented to the security being taken.

THIS was an action upon a promissory note and two bills of exchange made and drawn by the Defendant in favour of *Moles* the Plaintiffs' testator.

The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Michaelmas* Term, when it was insisted for the Defendant, that part of the Plaintiffs' demand, to the amount of 40*l.* had been discharged by a bill of exchange for that sum given by the Defendant to *Moles*. The facts respecting this last-mentioned bill were as follows; it was drawn by the Defendant upon one *Atkinson*, payable to the Defendant's own order, and accepted by *Atkinson*, payable at the Defendant's house; the Defendant indorsed it to *Moles* and put it into his hands; *Moles* indorsed it to one *Newcomb*. When the bill became due it was presented at the Defendant's house for payment, which was refused; on the next day *Newcomb* gave notice to the Defendant of the non-payment, who thereupon desired him to take out a writ against *Atkinson*, saying, that if *Newcomb* would deliver the writ to him he would get *Atkinson* arrested. *Atkinson* having been accordingly arrested, and having lain some time in gaol, offered *Newcomb* to give him a warrant of attorney for the amount, payable by instalments. Upon this *Newcomb* told the Defendant that it was in vain to keep *Atkinson* any longer in gaol, and that he should take the warrant of attorney; to which the Defendant answered, "you may do as you like, for I have had no notice of the non-payment:" *Newcomb* replied, "how can you say so when you arrested *Atkinson* yourself?" *Newcomb* having accordingly taken the warrant of attorney

1803.

CLARK and Others v. DEVLIN.

attorney and let *Atkinson* out of gaol, it was contended that he had thereby discharged *Moles* the previous indorser as well as the drawer, and consequently the bill indorsed by the Defendant to *Moles*, which he had indorsed over for value, must be deemed a payment to the amount of 40*l*. A verdict was taken for the Plaintiffs, subject to the opinion of the Court, Whether, under the circumstances of the case, the bill for 40*l*. was to be considered as part payment of the debt declared upon?

Accordingly a rule *nisi* having been obtained in the course of last term for reducing the verdict,

Shepherd and *Best* Serjts. now shewed cause. The question is, Whether the indorsees could have maintained an action against the Defendant upon the bill for 40*l*.? for if they were entitled to maintain such action the Defendant had no right to consider it as part payment of the Plaintiffs' demand. It may be admitted that giving time to the acceptor will, generally speaking, discharge the drawer; but it does not do so in all cases. If the holder, after having given time to the acceptor, sue the drawer, the latter will be entitled to sue the acceptor, notwithstanding the agreement with the holder; it would therefore be a breach of faith in the holder to sue the drawer after such an agreement. This was the ground upon which the case of *English* v. *Darley*, *ante*, vol. 2. p. 61. proceeded. But if the drawer having notice of the holder's intention to give time to the acceptor, consent to his so doing, he will still remain liable, since it will not be competent to him to sue the acceptor within the time given to him. In this case the conversation between *Newcomb* and the Defendant amounted to a consent on the part of the latter, that the former should take a warrant of attorney from the acceptor payable by instalments; for when *Newcomb* mentioned his intention of so doing he did not object, but told him that he might do as he liked, and though he added that he was discharged by want of notice, that was not true, since full notice had been given to him.

Cockell and *Bayley* Serjts. in support of the rule. The general principle of law is, that if the holder give time to the acceptor without the consent of the intermediate parties, they are thereby discharged. This was clearly laid down in *Tindall* v. *Brown*, 1 *T.R.* 167. and *Walwyn* v. *St. Quintin*, *ante*, vol. 1. p. 652. and the case of *English* v. *Darley* proceeded on the same ground. In

this cafe however it is faid that the drawer affented to the conduct of the holder in giving time to the acceptor, but that is not the fair import of the converfation between the drawer and the holder. When the Defendant faid that *Newcomb* might do as he liked, it was faying that he muft act at his peril, and though he added that he was difcharged for a reafon which was not true, that can make no difference, for he was not bound to difclofe the grounds of his defence; he gave no confent, but left *Newcomb* to take his own courfe as he might be advifed. *Newcomb* having thought proper to give time to the acceptor, the Defendant has a right to take advantage of that circumftance.

Lord ALVANLEY Ch. J. It appears to me that a fufficient defence has not been eftablifhed with refpect to this 40 *l.* and that the conduct of the Defendant amounted to a tacit confent that *Newcomb* fhould give time to the acceptor. If the holder of a bill, without the knowledge of the other parties, give time to the acceptor, he cannot afterwards call on the other parties without an injury to the perfon to whom he has given time. In fuch cafe, therefore, thofe parties will be difcharged. But a man is not bound to feek his remedy againft the acceptor; if he fign judgment againft him he will not be bound to profecute that judgment; but he muft take care that he does not give the acceptor a defence againft the drawer. In this cafe the Defendant had complete knowledge of the non-payment of the bill, and of the holder's intention to take a warrant of attorney payable by inftalments; yet upon this latter circumftance being mentioned to him, he does not fay if you give time to the acceptor I will have nothing more to do with it, but he fuffers him to go away without making any objection. Such conduct amounts to a tacit confent to the intended agreement between the holder and the acceptor.

ROOKE J. (*a*). I am of the fame opinion. I agree to the general principle, that if the holder does any thing by which the drawer is injured, he ought not to be allowed to fue the drawer. But in this cafe the holder informed the drawer of his intention to take a warrant of attorney from the acceptor, which I think was equivalent to afking if the drawer had any objection to his fo doing. In fact the drawer made no objection, but told the holder he might do as he pleafed, faying that he was difcharged for want

(*a*) Mr. Juftice *Heath* was abfent.

1803.

Clark and Others *v.* Devlin.

of notice. This case stands entirely upon its own circumstances, and turns upon the construction which ought to be put upon the conversation between these two persons. I think it amounted to an assent on the part of the drawer, that the holder should take the warrant of attorney from the acceptor.

Chambre J. The acceptor of a bill is to be considered as the principal debtor, and the other parties as sureties only; the holder therefore, who is the creditor, ought not so to negotiate with the acceptor as to prejudice the remaining parties to the bill. On this ground the case of *English* v. *Darley* proceeded. If a creditor give time to the principal debtor, the collateral securities are discharged both in law and equity. But in this case the Defendant having assented to the payment by instalments, cannot now complain of being prejudiced by the conduct of the holder.

Rule discharged.

May 5th.

BALCH *v.* PHELPS.

If under a *dedimus potestatem* to take the acknowledgment of nine persons to a fine, the commissioners take the acknowledgment of six on one piece of parchment, and of three on another, the Court will not allow the fine to pass.

Praed Serjt. moved that a fine might pass notwithstanding an objection arising out of the following circumstances: A *dedimus potestatem* had been directed to commissioners to take the acknowledgment of nine persons. The commissioners took the acknowledgments of six out of the nine persons on one piece of parchment, and of the remaining three upon another piece of parchment; which mode of taking the acknowledgments was objected to by the officers. In support of his application he cited an anonymous case in *Cro. Eliz.* 576. and also produced an affidavit of all the parties, stating that they wished the fine to pass.

Lord Alvanley Ch. J. The objection is that there is no agreement by the parties to levy a fine jointly. Each party when he signs the acknowledgment reads the instrument, and agrees to keep his covenant together with such persons as acknowledge by means of the same instrument. Each of the parties therefore to the acknowledgment of the three, acknowledged that he was ready to keep his covenant together with two others, but not together with eight others. With respect to the case in *Cro. Eliz.* where the *dedimus* was to take the acknowledgment of four, and three only acknowledged, I am not sure that if three persons mean to

 join

join with a fourth in acknowledging a fine, and the fourth refuse, that the acknowledgment of the three first ought thereby to be vitiated.

HEATH J. These separate acknowledgments will not warrant a joint judgment.

Praed took nothing by his motion (*a*).

(*a*) *Vide Jennings v. Vernon, ante*, p. 361.

TAPP and Another *v.* LEE.

May 11th.

In an action on the case for giving a false character to a tradesman, whereby he was induced to trust an insolvent person, the Court held that fraud was necessary to support the action: but set aside a verdict for the Plaintiff on payment of costs, though there were some circumstances in the case from which fraud might be inferred, on a suspicion that the inquiry was made of the Defendant with a view to entrap him, and thereby obtain his guarantee for payment of the debt contracted by the insolvent.

THIS was an action on the case. The declaration stated that the Plaintiffs were linen-drapers, and that one *Tho. Brunell* was desirous of purchasing goods of them to the amount of 28 *l.* 4 *s.* 9 *d.* but they were unwilling to trust him with the said goods without being satisfied of his character and ability to pay for the same; and thereupon by one *James Abrahams* their servant they applied to the Defendant, with whom the said *T. B.* had before then dealt in the way of his the Defendant's business of a linen-draper, for the character of the said *T. B.* and his ability to pay for the said goods; nevertheless the Defendant well knowing the premises, but fraudulently intending to deceive and injure the Plaintiffs in their aforesaid trade and business, and to induce them to give credit to the said *T. B.* for the said goods falsely, fraudulently, and deceitfully represented, asserted, and affirmed to the said *J. A.* so being the servant of the Plaintiffs as aforesaid, of and concerning the said *T. B.* that he the said Defendant believed him the said *T. B.* to be an honest man; that he the said *T. B.* owed him the said Defendant money, and that the said Defendant was willing to trust him the said *T. B.* more; by means whereof, the Plaintiffs not knowing the contrary, but believing the same to be true, sold goods upon credit to the said *T. B.* to the amount of 28 *l.* 4 *s.* 9 *d.*; that the Defendant at the time of making such representation did not believe the said *T. B.* to be an honest man, and that in truth and in fact the said *T. B.* was then an uncertificated bankrupt, and in bad and insolvent circumstances, as the said Defendant well knew, and that the Defendant was not willing to trust the said *T. B.* more than the sum which the said *T. B.* then owed him; but on the contrary thereof had before then refused to

trust

trust him the said *T. B.* any longer, and that the said sum of 28 *l.* 4 *s.* 9 *d.* was still due and unpaid, and the Plaintiffs by means of the premises were likely to lose the same. Plea, not guilty.

At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Hilary* Term, it appeared that *T. Brunell* having had goods of the Plaintiffs at three different times to the amount of 28 *l.*, applied to them for more to the amount of 28 *l.* 4 *s.* 9 *d.*, who refused to trust him further without an inquiry into his character and circumstances, and accordingly sent *J. Abrahams*, their servant, to make inquiries of the Defendant, with whom *Brunell* had before dealt; that *Abrahams* having stated to the Defendant the above facts and the cause of his coming, the Defendant made the representation alleged in the declaration, upon which the Plaintiffs gave *Brunell* credit for the goods; that shortly after this the Defendant inquired of *Abrahams* if the Plaintiffs had trusted *Brunell*, to which *Abrahams* answered, "after what you said we could do no otherwise;" upon which the Defendant replied, "I did not think you was such a cake;" that *Brunell*, previous to the representation, had dealt with the Defendant for goods upon sale or return, and owed him money, and that the Defendant had in the last instance of an application for more goods refused to let him have any others than those already selected for him, amounting to about 10 *l.* because *Brunell* had not complied with a request of the Defendant to permit him to inspect his books and look into the state of his affairs; which request had been made in consequence of a report of writs being out against him; that the Defendant knew that *Brunell* had been a bankrupt, that he had not obtained his certificate, and that he was insolvent. The jury found a verdict for the Plaintiffs.

A rule *nisi* for setting aside this verdict having been obtained on a former day,

Shepherd Serjt. now shewed cause. The question for the decision of the jury was, Whether at the time when the representation was made the Defendant fairly disclosed the circumstances within his knowledge? It has been determined, both in *Pasley* v. *Freeman*, 3 *T. R.* 51. and *Eyre* v. *Dunsford*, 1 *East.* 318., that it is not necessary to maintain an action of this sort that the Defendant should have any interest in deceiving the Plaintiff. If the truth be misrepresented, or any material fact be suppressed whereby the Plaintiff is injured, this action is maintainable, though the misrepre-

sentation or suppression be not assignable to fraudulent views of interest in the Defendant. In the present case the Defendant not only stated that *Brunell* owed him money, but that he was willing to trust him with more, from which the Plaintiff must have been induced to believe that the Defendant considered him as a solvent man, whereas he knew at the time that a commission of bankruptcy had been taken out against him, and that he was insolvent, and moreover he had refused to trust him with goods beyond the amount of 10*l.* Indeed the subsequent expression of the Defendant, that he did not think the Plaintiff's servant had been such a cake, afforded strong evidence of fraud.

Best Serjt. in support of the rule. The cases of *Pasley* v. *Freeman* and *Eyre* v. *Dunsford* decide nothing more than that if a man deliberately state what he knows to be false he is liable to an action, but they have not decided that if he directly state what is true, and omit to communicate something more within his knowledge, he is on that account responsible. The expression of the Defendant, that he did not think the Plaintiff's servant had been such a cake, clearly shews his consciousness that he had not given such a character to *Brunell* as should have induced the Plaintiffs to trust him. Saying that he was an honest man amounted to no representation that he was a responsible man, and the assertion that he had trusted him and would trust him more, was true in part, inasmuch as he had trusted him, and was not negatived as to the remaining part by proof of his having refused to trust him after that period. It appears that previous to the inquiry being made of the Defendant, the Plaintiff had dealt with *Brunell*, and the object of inquiry seems to have been to obtain a guaranty from the Defendant, by inducing him to make some representation of *Brunell* which should render the Defendant liable to an action. Such an attempt, if sanctioned by the Court, will completely defeat the provisions of the statute of frauds. The case of *Haycraft* v. *Creasy*, 2 *East*, 92. was much stronger than this, for the Defendant there positively asserted that *E. F. Robinson* was a person who might be trusted with safety; yet the majority of the Judges in the Court of King's Bench held that as the assertion, though false, was made without fraud, the Defendant was not liable to an action.

Lord ALVANLEY Ch. J. I have great doubts whether this can be deemed a verdict against evidence, though perhaps I should not

1803. TAPP and Another v. LEE.

have concurred in finding such a verdict myself; for it cannot be said that there was not evidence to be left to a jury of fraud in the Defendant. On this species of action my mind is made up. After the determinations which have taken place, I am bound to hold that such an action lies, though I much wish that the legislature would interfere in restraining these actions, unless the representation on which they are made be given in writing. The Judges have determined that if a man fraudulently and with intention to deceive make a representation by which he causes credit to be given to another, an action arises *ex delicto*. Lord *Kenyon* indeed went further; he did not think the proof of fraud necessary, but was of opinion that if a man made an assertion without sufficient ground, whereby another was injured, he rendered himself liable to an action. If a man say, "If you trust *A.* I will pay you;" he is not liable upon the credit which he has obtained for *A.*; yet if he say that *A.* is a good man, he is held liable for the credit which by that assertion he obtains for *A.* In such case, however, if we are bound to hold him liable, we ought to require satisfactory evidence that the character was given with an intention to deceive. In stating my opinion to the jury on the evidence in this case, I told them that unless they believed that the party knew the representation to be false at the time when he made it, and intended thereby to obtain credit for *Brunell*, they ought not to find a verdict for the Plaintiff; and I pointed out to them the circumstances from which it appeared probable that the inquiry made by the Plaintiffs was intended as a trap. Certainly the Defendant has no reason to complain of my direction, and though I doubt whether the jury have drawn a right conclusion, yet I think it cannot be called a verdict against evidence. We should therefore invade the province of a jury too much if we were to grant a new trial in this case without payment of costs; but as there are circumstances of suspicion in the case, I think on payment of costs there ought to be a further inquiry.

HEATH J. I think that my Lord laid down the law correctly to the jury. The evidence of fraud turned on the single expression of the Defendant, that he did not think the Plaintiff's servant had been such a cake; the effect of which was to be decided upon by them. If he meant to say that he did not think the Plaintiff's servant would have been such a dupe, it should seem as if he meant

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to exult in the calamity into which he had led his fellow-tradesman. In saying that he had trusted him, and would trust him again, he might possibly intend that declaration to be accompanied with a reservation of his paying what he had already trusted him. Certainly this is not an action to be favoured; but if a new trial is granted it must be on payment of costs.

1803.
TAPP and Another v. LEE.

ROOKE J. The importance of the question involved in this kind of case makes it fit to be reconsidered. It appears to me indeed that there is reason to suspect the Plaintiffs intended to practise a trick on the Defendant, and therefore I have no objection to a new trial being granted on payment of costs.

CHAMBRE J. Cases of this sort are within all the mischief intended to be prevented by the statute of frauds; but I think that statute does not extend to them. I much wish indeed that it did, not only on account of the extensive consequences to those against whom such actions are brought, but in respect of the evidence to be produced at the trial. It is very desirable that representations of character, by which parties are made liable, as well as engagements for the debts of third persons, should be in writing; but that is not the law. The action itself is modern in practice, but had there been no decision on the subject, I should still think it founded on solid legal principles. It would be an absurdity in law to hold that if a man draws another into a snare, the party suffering should have no remedy by action. An action on the case for deceit is an action well known to the law, and I cannot agree in the argument which has been used for the Defendant, that such actions ought to be confined to representations which are literally false. Fraud may consist as well in the suppression of what is true, as in the representation of what is false. If a man, professing to answer a question, select those facts only which are likely to give a credit to the person of whom he speaks, and keep back the rest, he is a more artful knave than he who tells a direct falsehood. As to the case of *Haycraft* v. *Creasy*, I agree with the majority of the Judges who decided the point of law. In that case there was no fraud; but fraud is the foundation of the action. There the Defendant himself was misled; every thing which he stated he believed; the ground of action therefore totally failed. Considering the circumstances which attended the present case, I think it proper that it should be tried again, but it must be upon payment of costs. The

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1803.

TAPP and Another v. LEE.

jury were not misdirected in point of law; the fact left to their consideration was the fraud, and I think that there was evidence upon which fraud might have been found. Did the Defendant tell the whole truth upon those points which he could not but know to be material to the object of the Plaintiff's inquiry? I do not think that he did, even if every fact which he stated was literally true. It is not pretended that he was ignorant that the object of the inquiry was to ascertain whether *Brunell* was a person to be trusted. Professing to give an answer to that inquiry, he not only says that he believes *Brunell* to be an honest man, but he adds by way of inducing the Plaintiff to give credit to him, that he had trusted him, and would trust him more. Was that all that the Defendant knew to be material? He knew that *Brunell* had been a bankrupt. He had agreed to give him credit, and *Brunell* had ordered goods, but in consequence of hearing that writs were out against *Brunell*, the Defendant desired to see his books, which *Brunell* refused; upon which the Defendant limited his credit. Was not that a fact to be communicated? In a subsequent conversation he says triumphantly that he did not think the Plaintiff would have been such a cake. These circumstances certainly afforded evidence of fraud. To determine upon that evidence was the peculiar province of the jury. Still however I think that there was ground to suspect that the Plaintiff himself had practised a trick upon the Defendant. And in a case of this nature, if the Defendant thinks it worth his while to pay the costs, I think he ought to be allowed the opportunity of taking the opinion of another jury.

Rule absolute on payment of costs.

May 13th.

FEISE *v.* LINDER.

Action on the case for saying of a merchant, "he has brought a false bill of lading for half the cargo (meaning the lading of a particular ship) already," whereby he was injured as such merchant, and lost the confidence of several persons, (without naming them) was held not maintainable, and judgment accordingly arrested, because the words did not of themselves impute any crime.

THIS was an action for words. The 5th count of the declaration stated that the Plaintiff was an honest person, and as such had conducted himself, and never was suspected of fraud, forgery, or deceit; that he in the course of his business as a merchant, and before the speaking and publishing of the words, had received and had a certain bill of lading of and relating to divers goods imported into this kingdom in a ship called the *London*, consigned to the

 Plaintiff

plaintiff or his aſſigns, which ſaid bill of lading he had produced to the Defendant, and had required the delivery of the goods; yet the Defendant well knowing the premiſes, but intending to prejudice him in his character, credit, and buſineſs, in a certain diſcourſe with divers perſons concerning the Plaintiff, and the ſaid bill of lading ſo produced by him as aforeſaid, falſely, maliciouſly, openly, and publicly, and in the preſence and hearing of the ſaid perſons ſaid, ſpoke, and with a loud voice publiſhed of and concerning the Plaintiff in his ſaid buſineſs, and of and concerning the ſaid bill of lading, the falſe, ſcandalous, malicious, and defamatory words following, that is to ſay, "He (meaning the Plaintiff) has brought a forged bill of lading for half the cargo (meaning the lading of the ſaid ſhip) already." By reaſon of the ſpeaking and publiſhing which ſaid words the Plaintiff was greatly injured in his character and credit, and in his ſaid buſineſs, inaſmuch as divers perſons, ſubjects of this realm, and others, who were uſed and accuſtomed to place truſt and confidence in him, and to deal with him in his ſaid buſineſs, on occaſion of the ſpeaking and publiſhing of the ſaid words had refrained from and refuſed to deal with him, and the Plaintiff by reaſon thereof was ſuſpected to be guilty of fraud, *damno*, &c. The Defendant pleaded that before the ſpeaking of the ſaid words the Plaintiff obtained of him certain goods by the production of a forged bill of lading, by reaſon whereof the Defendant ſpoke the ſaid words, without this, that he ſpoke them before. The Plaintiff replied, *de injuriâ ſuâ propriâ abſque tali cauſâ.*

The cauſe was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after laſt *Hilary* Term, and a verdict was found for the Plaintiff on the above 5th count.

In this term *Lens* Serjt. obtained a rule *niſi* for arreſting the judgment, on the ground that the words alleged to have been ſpoken by the Defendant contained in themſelves no criminal charge againſt the Plaintiff, inaſmuch as they did not impute to him any knowledge of the bill of lading having been forged, and that there was no allegation of an intention to inſinuate ſuch knowledge in the count.

Shepherd Serjt. now ſhewed cauſe, and contended that as the words were averred to have been falſely and maliciouſly ſpoken, the declaration was ſufficient to charge the Defendant after verdict; that no averment could be neceſſary of the bill of lading having

1803.

FEISE v. LINDER.

been forged, since the words would not be less actionable if it had not been forged; that where the words spoken may or may not impute criminal conduct to the Defendant, if they be averred to have been spoken maliciously, it must be intended after verdict that they conveyed an imputation of a criminal nature.

Lord ALVANLEY Ch. J. The argument which has been urged for the Plaintiff goes this length, that any words of reproach may be made actionable by the introduction of the word "maliciously" in the declaration; I believe however that has been decided otherwise. The general rule is, that words are only actionable when accompanied by special damage, unless they imply something by which the party of whom they are spoken would be subjected to punishment either for a felony or a misdemeanor (*a*). But these words do not impute any thing by which such a penalty would be incurred. Though the words be maliciously spoken the party will not be entitled to a remedy unless he sustain special damage from them; yet as no one ought to utter a falsehood, if any special damage be occasioned by such falsehood, the party who speaks them must be answerable though he impute neither felony nor misdemeanor. To bring a forged bill of lading might or might not be an innocent thing, and though the words are capable of being construed in a bad sense, yet this declaration contains no sufficient charge to sustain the verdict.

HEATH J. I am of the same opinion. It has been clearly settled that epithets will not make that a crime which does not otherwise appear to be so. The charge in this case may only amount to extreme negligence in the Plaintiff in bringing a forged bill of lading when he ought to have discovered the forgery, and yet impute no crime as arising from a knowledge of the forgery.

ROOKE J. The rule of law as to what words are actionable and what not, is, that the words spoken must either subject the party to an indictment for a felony or a misdemeanor, or occasion some special damage (*b*). The present case does not fall within that rule.

(*a*) Exceptions to this general rule are, words which subject a man to punishment in a particular place by custom, or which tend to his disherison, or which are spoken of him in his office, profession, trade, &c. or which impute to him an infectious disease. See instances of these several kinds *Com. Dig.* tit. *Action on the Case for Defamation*, *D.* 10. to *D.* 29.

(*b*) On the subject of special damage, the mode of alleging it, and the consequences of so doing see *Croft* v. *Borte*, 1 *Saund.* 243. *b.* *n.* 5. and *n.* 8. by Mr. Serjt. *Williams*; and *Todd* v. *Hastings*, 2 *Saund.* 307. *n.* 1. by the same learned author.

CHAMBRE

Chambre J. The essence of the crime supposed to be imputed to the Plaintiff is knowledge. If this declaration could be sustained, we might expect similar actions by letter-carriers, of whom it may frequently be said that they have brought forged bills to persons to whom they deliver letters.

Rule absolute (*a*).

(*a*) So it has been holden, that to say of another that he had sued upon forged bonds, or that he had recovered 400*l.* by forgery, is not actionable; for the words do not impute to the party of whom they are spoken any knowledge of the forgery. *Twisleton* v. *Hobbs*, 1 *Vent.* 3. *Hare* v. *Mellor*, 3 *Leon.* 138.

Roe on the Demise of George Walker *v.* Joseph Walker. *May* 16th.

A. devised to his wife his house and goods, with all his lands, goods, and chattels whatsoever and wheresoever, for her life; and after her death to two younger sons till they should attain the age of 15, for their education. He then devised his aforesaid house, goods, and chattels, equally to be divided between all his sons and daughters, share and share alike. Held that under the last clause of the devise the lands did not pass.

This ejectment was brought to recover the possession of six acres of land, six acres of meadow, and six acres of pasture, with the appurtenances, at *Horninglow* in the county of *Stafford*, and came on to be tried at the last *Lent* assizes for that county, before Mr Justice *Lawrence*, when it was agreed that a verdict should be taken for the Plaintiff, subject to the opinion of this Court on the following case:

William Walker, grandfather of *George Walker* the lessor of the Plaintiff, being seised in fee of a house in which he dwelt, and about seven acres of land, situate at *Horninglow* aforesaid, in the said county of *Stafford*, by his last will, bearing date the 13th *June* 1762, executed in the presence of three witnesses, devised as follows: "First, I give, devise, and bequeath unto my wife *Mary Walker*, my house wherein I now dwell, with my goods that are in and about the same, with all my lands, goods and chattels whatsoever and wheresoever they be, for and during her natural life, she paying all my debts and funeral charges. And if my aforesaid wife should die before my sons *Henry Walker* and *Robert Walker* come to the age of fifteen, then my mind and will is, that my house, lands, goods, and chattels, that is to say, the rents arising from the same, shall be employed to the bringing of them up until they come to the age of fifteen; then my mind and will is, that my aforesaid house, goods, and chattels, shall be equally divided amongst all my sons and daughters that shall be living at that time, share and share alike." The said *William Walker* died on the 24th *August* 1762, seised of the said house and land, with-

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1803.
ROE
v.
WALKER.

out having revoked his said will, and leaving the said *Mary* his widow, *John Walker* his eldest son and heir at law, and *William*, *Mary*, *Thomas*, *Henry*, *Joseph* (the Defendant), *Samuel*, *Hannah*, and *Robert Walker*, his younger children him surviving. The said *Henry Walker* attained the age of fifteen years in the life of the said *Mary*, widow of the said *William* the devisor; the said *Robert Walker* died on the 11th *June* 1769, being only 12 years of age, in the life-time of the said *Mary*, widow of the said *William* the devisor; the said *Mary* the widow of the said *William* the devisor died on the 10th *April* 1784, in possession of the said house and land under the said will. *John Walker* the father of the lessor of the Plaintiff in this ejectment, and the other surviving children of the testator immediately after the death of *Mary* the widow of the testator, to whom he devised the estate, lands, and premises for life, with full knowledge of the contents of the will, divided the devised messuage, lands, and premises, into as many equal parts or shares as there were children then living, and threw lots for their respective shares or divisions of the devised estate and lands. *John* the lessor's father, as the eldest son of the testator, pursuant to such division drew the first lot, and thereupon entered into the possession of the said lot so drawn by him, and held and enjoyed the same in severalty from that time until his death. And the said *Joseph* and the other surviving children at the same time entered into their respective shares so drawn by lot as aforesaid, and held and enjoyed the same in severalty as devisees under the will of the said *William Walker* the devisor. The said *Joseph* the Defendant still continues in possession of his share, never having been molested or interrupted in the possession thereof by *John* the lessor's father, who died on the day of in the year of our Lord nor until the present ejectment was brought.

The question for the opinion of the Court was, Whether the land of which the said *William Walker* the devisor so died seised as aforesaid, passed by his said will to his younger children living at the death of his said widow *Mary*, or descended through his eldest son *John* to his said grandson and heir at law *George*, the lessor of the Plaintiff? If the Court should be of opinion that the land did so descend to the said *George* as aforesaid then the verdict to stand; but if the Court should be of opinion that the said land did pass by the

the said will as aforesaid, then the verdict to be entered for the Defendant.

Best Serjt. was to have argued in support of the claim of the lessor of the Plaintiff,

But *The Court* desired *Williams* Serjt. who was on the other side, to begin. He observed, that though he felt to a certain degree that he had to contend in this case with the old maxim as applied to a testator, *viz. quod voluit non dixit*, still he should contend that there was on the face of this will such a plain and manifest intent in the testator to devise amongst his children all that he had before devised to his wife, that the Court might supply such words as would effectuate that intent. This intent, he said, might plainly be collected from the provisions of the will, for after giving to his wife for life all that he had, the testator anxiously guarded against the event of her death before his two younger children had attained the age of 15, by leaving all that he had given to his wife to be employed about their education till they attained that age, and then he devised what he had so disposed of for the above period amongst his family. He insisted the Court could not intend that the testator meant to give a less estate to all his children, including his heir at law, than he had before devised for the education of two younger children; and though it was true that express words were necessary to disinherit an heir at law, yet that rule had generally been applied to cases where the devise from the heir was to strangers, and not as in this case amongst the devisor's children. He instanced the case of a devise of copyhold without a surrender to the use of the will, where the Court of *Chancery* gives effect to the devise against the heir at law, though the devise be not correct in form. [Lord *Alvanley* Ch. J. In that case the court of equity only acts upon the conscience of the heir at law. I agree that if a devise be after the death of a testator's wife to his second son, the heir at law will take during the life of the wife, and that if the devise be after the death of the wife, to the devisor's first son, there the heir at law being the first son, will not take during the life of the wife, but she will have it for her life; there, however, though the words of exclusion be not express, yet the first son is excluded by necessary intendment.] He referred to *Bagnell* v. *Abnett*, 4 *Mod.* 141. where the testator having two houses, one called the upper house and the other called the lower house, devised *all* his tenements for the payment of his debts until his grandson should

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1803.
Roe
v.
Wessly.

come of age, and afterwards he devised all his said tenements, *videlicet*, two parts of the lower house for raising 200*l.*, the remainder to his grandson and his heirs; the question was, Whether the *videlicet* and the clause that immediately followed it did not restrain the devise to the lower house only, or whether the whole passed to the grandson by the words that went before, *viz* all the said tenements? And it was holden that both the houses passed to the grandson.

The Court observed they never knew an instance in which the subject of devise was supplied on account of a supposed omission; that indeed no mistake in a will ever could be rectified by the Court, unless it could be first demonstrated that such mistake did exist, and that in the present case, however strongly they might conjecture what the devisor intended to have done from the previous devise to his wife and his younger children, yet it was not of necessity to intend that he meant to have added the word "lands" in the last clause of his will. They also remarked that in *Bagnell* v. *Abnett* the words following the *videlicet* were absolutely inconsistent with the preceding terms of the devise, and consequently they were rejected.

Postea to the lessor of the Plaintiff.

May 16th.

Burrell *v.* Dodd.

The customary tenement in the north of *England*, which are parcel of the respective manors in which they are situate, and descendible from ancestor to heir by the hereditary right called tenant right, and held of the lord according to the custom, are not within the statutes of partition.

This was a proceeding on the writ *de partitione faciendâ*. The declaration was as follows: "*Northumberland*, to wit, *Thomas Dodd* was summoned to answer *Cuthbert Burrell* in a plea wherefore whereas the said *Cuthbert* and *Thomas* hold together and undivided 70 acres of land, 70 acres of meadow, and 70 acres of pasture and common of pasture, with the appurtenances in the parish of *Simonburn* in the said county of *Northumberland*, of which the said *Thomas* denieth partition to be made between them, according to the form of the statute in such case made and provided, and unjustly permitteth not the same to be done, and contrary to the form of the statute: And whereupon the said *Cuthbert* by *C. S.* his attorney says, that whereas the said *Cuthbert* and the said *Thomas* hold together and undivided the tenements aforesaid with the appurtenances whereof it belongs to the said *Cuthbert* and his heirs to have one moiety of the tenements aforesaid with the appurte-

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nances, to hold to him and his heirs in feveralty; fo that the faid *Cuthbert* of his moiety belonging to him of the tenements aforefaid, with the appurtenances, and the faid *Thomas* of his moiety belonging to him of the tenements aforefaid with the appurtenances, may feverally apportion themfelves, he the faid *Thomas* denieth partition thereof to be made between them, according to the form of the ftatute in fuch cafe made and provided, and unjuftly permitteth not the fame to be done, and contrary to the form of the faid ftatute; whereupon he the faid *Cuthbert* fays that he is injured and hath damage of 100 *l.*, and therefore he brings his fuit," &c. To this declaration the Defendant pleaded, 1ft, *Non tenuit modo et formâ*, and 2dly, That the premifes in queftion were parcel of the manor of *Henfhaw* granted and grantable by copy of the court-rolls by the lord of the faid manor in fee fimple or otherwife, *at the will of the lord*. On thefe two pleas iffues were joined. He then pleaded "that partition between the faid *Thomas* and the faid *Cuthbert* of the tenements aforefaid with the appurtenances ought not to be made becaufe he fays that the tenements with the appurtenances in the faid declaration mentioned now are, and from time whereof the memory of man is not to the contrary have been fituate, lying within, and parcel of the faid manor of *Henfhaw*, in the faid parifh of *Simondburn*, and cuftomary tenements of that manor, and during all that time defcendible, and which have defcended from anceftor to heir as of the hereditary right of the tenants called tenant right, held of the lord of the faid manor for the time being, as of that his manor by divers rents and certain fervices, according to the cuftom of the faid manor; and this he the faid *Thomas* is ready to verify; wherefore he prays judgment if partition between the faid *Thomas* and the faid *Cuthbert* of the tenements with the appurtenances ought to be made, &c. To this plea there was a demurrer, affigning for caufes, "that it is not fhewn or alleged in or by the fame plea how or in what manner the tenements with the appurtenances in the faid declaration mentioned are or have been defcendible, nor how or in what manner they have been defcendible or have defcended from anceftor to heir, nor from what anceftor to what heir they have been defcendible or have defcended, nor as of what hereditary right, nor as the hereditary right of what tenants they have been defcendible or have defcended, nor by what rents nor by what fervices they have been held of the lord of the faid manor; and alfo for that the fame plea is in various other refpects infufficient, defective, and informal." The Defendant joined in demurrer.

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1803. BURRELL v. DODD.

This case was shortly spoken to in *Hilary* Term last, when the Court intimated a wish that the Defendant should consider whether he could not add to his plea after the words "held of the lord of the said manor for the time being," the words "at the will of the lord," as that allegation, if true, would decide the question. Accordingly the case stood over till this term, when the Defendant's counsel having informed the Court that they could not safely amend the plea in the manner proposed,

Bayley Serjt. was heard in support of the demurrer. The question arising upon this demurrer is, Whether the estate which is the subject of this writ be of such a nature as to fall within the provisions of the statutes of partition 31 *H* 8. *c* 1. and 32 *H.* 8. *c.* 32.? It may be admitted that mere copyhold estates are not within the provisions of the statutes of partition; but the admission does not extend to customary freeholds, and on the face of this plea the Court must hold the estate in question to be a customary freehold. All the precedents in which customary freeholds are described use the words "parcel of the manor" as part of the description. The reason why mere copyholders are not within the statutes of partition is, that they have no estate of inheritance, but hold entirely at the will of the lord; whereas customary freeholders have a freehold in point of interest, as is admitted by Mr Justice *Blackstone* in his law tracts, tit. *Considerations on Copyholders*, vol. 1. p. 132 to 138. where he distinguishes between those who hold by copy of court-roll at the will of the lord and those who hold by copy of court roll according to the custom of the manor; the former he considers to be tenants in pure villenage, the latter in villein socage (*a*). The reason assigned by Lord *Coke*, 2 *Inst.* 325. why tenants in antient demesne are entitled to have a summons to warranty is illustrative of this doctrine; for he puts it on the ground of the freehold being in the tenants, which he says is not the case with a tenant by copy of court-roll in a court-baron. On these pleadings it must be intended that the tenants do not hold at the will of the lord. Indeed on this point the case of *Gale* v. *Noble*, *Carth.* 432. is very strong, for there on a trial at bar in ejectment for lands, parcel of the manor of *Corsham* in *Wilts*, which by very antient books of that manor appeared to be parcel of the Duchy of *Cornwall*, and to pass by surrender and copy of court-roll, the lands were holden to be customary freehold and not copyhold, because

(*a*) In *Co Litt.* 59*b.* it is said that by custom a freeho'd and inheritance may pass by surrender in the lord's court without the leave of the lord.

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they were not granted *ad voluntatem domini manerii*, but only *tenend' secundum consuetudinem manerii*. The Court are bound to take notice of the peculiarities attending the tenures in gavel-kind and borough *English*; but they are not bound to take notice of the peculiarities attending these customary freeholds, however general they may be in the North of *England*. [*Chambre* J. In every instance in which these tenures have come before Courts they have taken notice of them.] In *Rogers* v. *Brudly*, 2 *Vent.* 143. in replevin a conusance under persons deriving title from one *J. M.* "as seised in fee of a close called *Underway*, parcel of the manor of *Lisford*, of which the place where, &c. was and is parcel, according to the custom of the said manor," was held to be a conusance under persons having a freehold, because it was not said that they held at the will of the lord. [*Heath* J. In that case no tenancy at will could be intended where the allegation was of a seisin in fee.]

Clayton Serjt. was to have argued *è contra*,

But *The Court* stopped him, saying it was unnecessary to enter into the nature and peculiarities of the tenure under which the lands in question were holden as disclosed by the plea; for that it was a sufficient objection to the Plaintiffs obtaining judgment, that the land upon the face of the plea appeared not to be freehold properly so called, and therefore not within the statutes of partition; that the plea alleged as an excuse for the defendant's not making partition, that the premises sought to be divided were not in their nature divisible, being "parcel of the manor," and held of the lord as "tenant right," which sufficiently negatived its being freehold (*a*), for that no freehold could, strictly speaking, be said to be *parcel of the manor*; they also referred to *Coke's Cop. s.* 32. where speaking of the various sorts of tenants now known by the name of copyholders, as distinguished from what they were formerly, he observes "they were every where then called tenants by copy of court-roll, or tenants at will, according to the custom of the manor, which styles import unto us three things: 1. *nomen*, 2. *originem*, 3. *titulum*. First, his name is tenant by copy of

(*a*) In *Glover* v. *Cope*, 1 *Show.* 287. where the question was, Whether the surrenderee of a copyhold could maintain covenant against the lessee of the surrenderor after the lessee had assigned over? *Lewis* Serjeant *arguendo*, said, "the tenant-right estates in the North, which are not freeholds, will be within the same consideration as copyholds."

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1803. Bennett v. Boone.

court roll, for he is not called tenant by court-roll, but by copy of court-roll, and this is the sole tenant in law who holdeth by copy of any record, charter, deed, or any other thing; 2d, His commencement is at the will of the lord, for these tenants in their birth as well as the customary tenants upon the borders of *Scotland*, who have the name of tenants, were mere tenants at will, and though they keep the customs inviolate, yet the lord might *sans* control, eject them; neither was the estate hereditary in the beginning, as appeareth by *Britton*; for if they died their estate was presently determined, as in case of a tenant at will at common law. And in some points to this present hour the law regardeth them no more than a mere tenant at will; for the freehold at the common law resteth not in them but in their lords, unless it be in copyholds of frank tenure, which are most usual in ancient demesnes."

Judgment for the Defendant.

(IN THE EXCHEQUER CHAMBER.)

May 15th.

Davis Gent., one, &c. v. Edmonson, in Error.

A common informer may recover penalties against an attorney for not entering his certificate according to the provisions of 37 *Geo.* 3. c. 90. *f.* 26. though no power is expressly given to him by that statute; for the 25 *Geo.* 3. c. 80 which gives that power, and the 37 *Geo.* 3. c. 90 are *in pari materiâ*.

Error from a judgment of the Court of *King's Bench* in debt for a penalty of 50*l.* for having "in expectation of gain, fee, and reward, sued out of the court of our lord the king of the Bench at *Westminster*, a certain writ of our lord the king, commonly called a *capias ad respondendum*, at the suit of one *W. S.* and one *W. D.* against the Defendant in error, without having entered such certificate as in and by the statute in such case made and provided is directed, *contrà formam*," &c. The Defendant in error having obtained judgment in the court below for the penalty, the Plaintiff in error assigned several errors upon the record; but the only objection relied upon in argument in this court was, that the 37 *Geo.* 3. c. 90. *f.* 30. which created the penalty, gave no such action as the present to a common informer; but that the penalty was only recoverable by information at the suit of the attorney-general. This case was twice argued; 1st, by *Bayley* Serjt. for the Plaintiff in error and *Lawes* for the Defendant in error, and 2dly, by *Marryat* for the former and *Gibbs* for the latter.

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The Court took time to consider of their opinion, which wa this day delivered by

Lord ALVANLEY Ch. J. The question in this case arises out of the provisions of the 25 *Geo.* 3. *c.* 80. and the subsequent statute, which have been passed upon the same subject. That act imposes a duty on certificates to be taken out by solicitors and attornies practising in the courts of law and equity. The manner in which the certificate is thereby directed to be taken out is as follows: Every solicitor and attorney is annually to give into the court in which he has been admitted a note of his name and residence, upon which certain officers are directed to issue the certificates in question, renewable ten days previous to the period of their expiration. The seventh section imposes a penalty of 50*l.* upon every person who shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute, or defend any action or suit, or any proceedings, as a solicitor, attorney, notary, proctor, agent, or procurator, in any of the courts aforesaid, in expectation of any fee or reward, without having obtained such certificate, or shall deliver in a false place of residence, to evade the payment of the higher duties imposed by the act, to be recovered and applied as thereinafter is directed; and such person is made incapable of suing in any court of law or equity for the recovery of any fee, reward, or disbursement, on account of prosecuting or defending any such action, suit, or proceeding. Then follow two clauses which are material to the consideration of the question before the Court. The eighth section enables persons who have taken out certificates to act for others who have also taken them out; and the ninth provides that any person who has taken out a certificate in one court may practise in any other court in which he is sworn, although his certificate did not issue from that court. Both these clauses were introduced for the benefit of the party upon whom the penalty attaches; and neither of them is re-enacted in the subsequent statute 37 *Geo.* 3. *c.* 90. By *s.* 29. of the 25 *Geo.* 3. *c.* 80. it is directed that all penalties created by that act may be sued for by action of debt, bill, plaint, or information, to the use of the Plaintiff who shall sue for the same. The 37 *Geo.* 3. *c.* 90. was passed for the purpose of creating several new stamp duties, and also for better securing the duties on certificates to be taken out by solicitors and attornies. The first part of the act relates to the new duties: and the 6th section provides that all powers, provisions,

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1803.

Davis v. Edmonson.

rules, methods, articles, clauses, penalties, and forfeitures, and distributions of penalties and forfeitures of all former acts in force at the time of the passing of that act, and not thereby altered, should, as far as the same were applicable, be in force with respect to the additional and other duties therein before mentioned. In the latter part of the argument it was very properly admitted that this section must be confined to the new duties created by the former part of the act, though at first it was contended that it might be applied to penalties mentioned in the subsequent part of the act. The provisions respecting certificates begin at section 26, which, after reciting that by the 25 *Geo.* 3. certain duties had been imposed on certificates, and that for avoiding frauds it was expedient that those certificates should be taken out only at the head office for stamps, directs that every solicitor and attorney shall annually deliver in at the head office for stamps a note containing his name and place of abode, in the same manner as he had before delivered in such note to the officer of the court. It then provides that the certificates when obtained shall be entered with the officer of the court, and also specifies the periods at which the certificates shall bear date, and when they shall expire. The 30th section of the act imposes the penalty; and enacts, that if any person shall sue out any writ or process, or commence, prosecute, carry on, or defend any action or suit for fee or reward, or shall do any act in the said court as an attorney, &c. without obtaining a certificate in the manner thereinbefore directed, or without entering the same in one of the courts wherein he shall be admitted, or shall deliver in at the head office any account of his place of residence, contrary to the 25 of *Geo.* 3. with intent to evade the payment of the higher duties by the said act imposed, he shall for every such offence forfeit and pay the sum of 50*l.*, and be rendered incapable of suing for the recovery of any fee, &c. on account of any action carried on without such certificate. The operation of this part of the act is to substitute a new mode of taking out certificates in the place of that prescribed by the 25 *Geo.* 3. continuing the same penalty, and preserving and referring to the regulations of the 25 *Geo.* 3. so far as they require a true account to be given of the place of residence, but adding indeed a new penalty for the offence of not entering the certificate. This part of the act however is totally silent respecting the mode in which the penalty shall be recovered.

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covered. It has been contended that the 37 *Geo.* 3. having altered the offence created by the 25 *Geo.* 3., or having created a new one, and having added the offence of not entering the certificate, the penalty can only be sued for in the manner prescribed by the act which creates the offence: and it is admitted that where a penalty is created and no particular mode pointed out in which it shall be recovered, nor any particular person specified to whom it shall be paid, that it can only be sued for by the king. It is therefore urged for the Plaintiff in error, that the penalty to be recovered under the 37 *Geo.* 3. is a new and separate penalty, and as much independent of the 25 *Geo.* 3. as if that act had been altogether repealed. It cannot be denied that the practice of authorising common informers to sue is an efficacious expedient, without which the revenue laws would fall very short of their object. It would therefore be singular indeed if an act of parliament passed for the express purpose of further securing the duties imposed by the 25 *Geo.* 3. by the introduction of regulations to prevent fraud should have repealed that section of the 25 *Geo.* 3. which empowers and invites common informers to sue for the penalties thereby imposed. Without very clear reasons for believing this to be the intention of the legislature we should feel great reluctance in adopting such a construction. The counsel for the Plaintiff in error, feeling this difficulty, contended that the 25 *Geo.* 3. was not repealed, but that it was still competent to a common informer to sue for a penalty under that act where a certificate had not been obtained. But upon looking into the acts it appears most clearly that the offence of not obtaining the certificate is totally different since the passing 37 of *Geo.* 3.; the certificate according to that act being to be taken out in a new way. For the Defendant in error, the case of *Duck* v. *Addington*, 4 *T. R.* 447. has been relied on. The 10 *Geo.* 3. *c.* 44. *s.* 7. relative to hackney coaches enacts, that the forfeitures and penalties thereby inflicted may be recovered and levied not by the commissioners, but by any justice of the peace, "by such ways and means as the penalties and forfeitures in the act of the 9th of *Anne* are directed to be levied and recovered." The 9 *Ann.* *c.* 23. only empowered the commissioners to commit to prison upon default of distress, but subsequent acts had given them other powers, and the 5th section of the 10 *Geo.* 3. *c.* 44. had declared that they had the power of immediate commitment. The

1803. DAVIS v. EDMONSON.

Court of *King's Bench* held, that all the acts were made *in pari materiâ*, and formed one general system of law upon the subject, and that the legislature had intended to give the same power to the justices of immediate commitment that was conferred upon the commissioners. I have looked into those acts: and I am perfectly clear that in the present case we are as much bound to consider the two acts of the 25 *Geo.* 3. and 37 *Geo.* 3. as made *in pari materiâ*, and to enforce them accordingly, as the Court of *King's Bench* were in the case of *Duck* v. *Addington*. It remains to be considered whether any other acts have passed demonstrating that it was not the intention of the legislature either to repeal the 25 *Geo.* 3., or to render its provisions less efficacious. Upon this point the 39 & 40 *Geo.* 3. *c.* 72. is extremely strong and almost decisive. The seventh section of that act, after reciting the 25 *Geo.* 3. and 37 *Geo.* 3. states, that doubts had arisen whether notaries not being admitted in any courts were liable to the duties imposed by those acts, for remedy whereof it enacts, that every person who shall act as a public notary without having been admitted in any court, and without having delivered in his name and place of residence, and taken out such certificate as is directed by the said recited acts, shall forfeit 50*l.* and be incapable to act as a notary, or recover any fee on account of such act; and every such penalty shall be recoverable and recovered, and applied in like manner in every respect as any penalty of the like value imposed by the said last-recited acts, or either of them, may be recovered and applied. The object of this act was to put notaries precisely in the same situation with attornies and solicitors. The penalty is precisely the same as that which is imposed upon attornies and solicitors, and the incapacity is expressed in the very same words as those which are employed in the 25 *Geo.* 3. and 37 *Geo.* 3. Yet by the very words of the 39 & 40 *Geo.* 3. the penalty is made recoverable by a common informer. But this is not all. Penalties having been incurred under the 37 *Geo.* 3. and many actions having been brought for the recovery of them by common informers, the legislature upon the application of the parties sued thought proper to pass two acts of indemnity, *viz.* the 37 *Geo.* 3. *c.* 93. and the 39 & 40 *Geo.* 3. *c.* 72. *s.* 17 & 18. and to relieve the Defendants upon payment of 100*l.* It is true, that if no penalty were previously imposed, an act of indemnity would not create one. But the conduct of the legislature affords very strong

evidence

evidence that all the acts which had passed upon this subject were considered as forming one body of law, and that it never was intended that any of the subsequent acts should weaken the provisions of those which had preceded. The very same objection which is raised in this case was taken in Dr. *Foster*'s case, 11 *Co.* 56. *b.* Dr. *Foster* having been sued for recusancy by a common informer upon the 23 *Eliz. c.* 1. which gave one-third of the penalty to the queen, one-third to the poor, and one-third to the informer, it was contended that the right of the informer to sue was taken away by the 35 *Eliz. c.* 1., which empowered the queen for the more speedy recovery of the penalty to sue by action of debt, bill, plaint, or information in the King's Bench, Common Pleas, or Exchequer. But the Court held, that as the latter statute was made for the more speedy recovery of the penalty, it was not intended to invalidate the provisions of the former act; and being all in the affirmative, should not repeal or abrogate a precedent affirmative law. So in the present case, it never could have been the intention of the legislature by the 37 *Geo.* 3. to take away one of the great securities introduced by the 25 *Geo.* 3. The only object of the 37 of *Geo.* 3. appears to have been to substitute another mode of taking out certificates, but the penalty and the mode of recovery were intended to remain the same. The only difficulty therefore in the decision of this case arises from that of *Barnard* v. *Gostling*, 2 *East*, 569. in which the Court of King's Bench came to a determination upon this point different from that which this Court is inclined to adopt. But it is observable, that the principal question there agitated was, whether an action could be brought for the penalty against two persons jointly. It was argued indeed, that all the statutes upon this subject were *in pari materiâ*, and that the remedy given by the 25 *Geo.* 3. was not taken away; but the main point to which the Court addressed their attention, and upon which they took time to consider, seems to have been, Whether the action could be maintained against two? The Court, in giving judgment, founded themselves on the ground that the 37 *Geo.* 3. gave no such action to the common informer, and it seems to have been almost taken for granted that if the 6th section of that act did not apply to the subsequent part of that act no such action could be maintained. But considering the 37 *Geo.* 3. as an act passed to enforce the collection of the duties created by the 25 *Geo.* 3., and referring to the principles by which acts of this kind have been usually construed,

1803.
DAVIS v. EDMONSON.

we think the 37 *Geo.* 3. is only a substitution of a new mode, but that the penalties are still recoverable by the same persons by whom they were recoverable previous to the passing of that act. Indeed if it could be successfully contended that the provisions of the 25 *Geo.* 3. are not incorporated into the 37 *Geo.* 3. where not expressly altered, persons taking out certificates would, under such a construction, lose the benefit afforded them by the 8th and 9th sections of the 25th *Geo.* 3., but which are not re-enacted in the subsequent act. Clearly, therefore, it was the intention of the legislature that the two acts should be construed *in pari materiâ.*

Judgment affirmed.

May 20th.

HADKINSON *v.* ROBINSON.

If a cargo of a perishable nature be insured from *A.* to *B.* with the usual memorandum, and in the course of the voyage information be received by the master that the port of *B.* is shut against the ships of his nation, in consequence of which the commander of the convoy orders the ship to proceed to another port, and the cargo be there sold by orders of the Vice-Admiralty Court for a very small sum of money, the assured cannot abandon as for a total loss. It seems that if the voyage be lost in consequence of the port of destination being shut against the ship insured, the assured cannot declare upon this as a loss within the policy.

THIS was an action on a policy of insurance upon a cargo of pilchards, on board the ship *Pascaro*, at and from *Mounts Bay* or any port in *Cornwall*, to *Naples*, with leave to join convoy at *Falmouth* or elsewhere. The policy contained the usual memorandum that corn, fish, salt, fruit, flour, and seed were warranted free from average unless general, or the ship should be stranded. The declaration averred the loss in the following manner: " And the said Plaintiff further says, that after the loading of the said pilchards on board the said ship or vessel, to wit, &c. the said ship or vessel, with the said pilchards so on board thereof as aforesaid, to be carried therein upon the said voyage in the said writing or policy of assurance mentioned, departed and set sail from the port of *Penzance* aforesaid, in the county aforesaid, on her said intended voyage in the said writing or policy of assurance mentioned, and afterwards, and whilst the said ship with the said pilchards on board was sailing and proceeding on her said voyage, and before her arrival at *Naples* aforesaid, to wit, on, &c. the port of *Naples* aforesaid was, by the persons then and there exercising the powers of government in the kingdom of *Naples*, shut against all ships the property of any of the subjects of our Lord the now King, or sailing under the colours of our Lord the now King, and against all merchandizes the property of any such subjects, carried in such ships, under pain of the said ships and merchandizes being con-

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1803.
HADKINSON v. ROBINSON.

fiscated by the persons then and there exercising the powers of government in the kingdom of *Naples*, whereby the said ship, with the said pilchards on board the same, (the said ship then and there being the property of some then subject or subjects of our Lord the now King, and sailing under the colours of our Lord the now King, and the said pilchards then and there being the property of the Plaintiff, who then and there was a subject of our Lord the now King,) was then and there prevented from pursuing her voyage to *Naples* aforesaid, and the said voyage was thereby then and there totally defeated and lost, and the said pilchards then and there became and were of no value to the Plaintiff, to wit, at, &c. whereof the Defendant afterwards, to wit, on, &c. had notice."

The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after *Michaelmas* term, when it appeared that the *Paxaro* on the 19th of *October* 1800 took in a cargo of pilchards at *Penzance*, with which she proceeded to *Falmouth* in order to join convoy; that on the 24th of *January* 1801 she sailed from *Falmouth* under convoy of the *Seahorse*; that after having met with much bad weather she put in to *Lisbon*, by order of the commodore, on the 18th of *February*; that she sailed again from *Lisbon* on the 2d of *March*, and on the 5th received intelligence that *English* vessels were excluded from all the ports belonging to the king of *Naples*; that on the 16th the masters were called on board the *Seahorse*, and those who were destined for *Naples* and *Sicily* received orders from the commodore not to proceed to their destinations, but to make *Port Mahon* in *Minorca*, in order to get further intelligence; that on the 25th the *Paxaro* arrived at *Port Mahon*, where the report respecting the state of the port of *Naples* was confirmed; that in consequence of this, a survey was taken of the cargo under the directions of the Vice-Admiralty Court at *Minorca*, and the cargo was afterwards sold by public auction, pursuant to the order of that Court, for a very small sum of money; that in consequence of intelligence having been received in this country of the treaty between the Republic of *France* and the King of *Naples*, by which vessels under *British* colours were to be excluded from all ports in the dominions of the King of *Naples*, the Plaintiff, on the 23d of *April*, gave notice of abandonment to the underwriters, which the latter refused to accept; and that as soon as the Plaintiff was informed of the sale at *Port Mahon*, he communicated all

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1803. Hadkinson v. Robinson.

the papers to the underwriters, and demanded payment for a total loss. The jury found a verdict for the Defendant. A rule having been obtained in *Hilary* term calling on the Defendant to shew cause why the verdict should not be set aside and a new trial granted,

Best Serjt. shewed cause. This is an attempt by a sale of the cargo at *Minorca* to create a total loss; whereas if the cargo had proceeded to its port of destination it would have been worth nothing, and yet the assured would not have been entitled to recover. Indeed the motives which influenced the conduct of the assured are plainly demonstrated by the facts in evidence; for before they had received information of the situation of the cargo, they gave notice of abandonment, because they understood that the ports of *Naples* would be shut. But in *Hamilton* v. *Mendez*, 2 *Burr*. 1198. Lord *Mansfield* expressly lays it down that an assured cannot elect to abandon before advice is received of the loss. Now in this case the only regular notice of abandonment was given previous to any advice having been received of the loss: and though the assured, after having received information of the sale at *Port Mahon*, handed over the account sales, together with the other papers, to the underwriters and demanded payment, yet as they did not specifically state their intention to transfer their interest to the underwriters, such communication did not amount to a notice of abandonment (*a*).

Shepherd and *Bayley* Serjts. in support of the rule. To entitle the assured to recover for a total loss, it is not necessary that the goods should either be actually destroyed, or taken out of the possession of the owners. It is sufficient if they are prevented from arriving at their place of destination by any of the perils insured against. The underwriter in this case contracted that the cargo should be carried in safety from *Mounts Bay* to *Naples*, notwithstanding the restraint of princes. And it is impossible to contend that the *Paxaro* was not as much prevented from proceeding to *Naples* by the restraint of princes as if she had actually been detained by the government of an intermediate port, since she could not sail into *Naples* without rendering herself liable to immediate confiscation. Suppose she had been detained at *Port Mahon* by embargo

(*a*) After the argument of Mr. Serj. *Best* the Court intimated to the other side that according to the case of *Poole* v. *Fitzgerald*, *Wills*, 641. the loss averred in this declaration was not such as the assured could recover upon, being only a loss of the voyage; and therefore, to avoid further argument, directed them to address themselves to that point.

embargo or by ſtreſs of weather, and in conſequence of the deterioration of the cargo the captain had been obliged to ſell there; the object of the voyage having been deſtroyed by perils within the policy, the underwriters muſt have been reſponſible. In the caſe of *Goſs* v. *Withers*, 2 *Burr*. 683., which was an inſurance upon fiſh, the aſſured was allowed to abandon and recover for a total loſs, though the ſhip had been recaptured, and the cargo remained in ſpecie at *Milford Haven*. The only ground upon which the Court could have determined that the loſs was total, muſt have been that the voyage was defeated. Lord *Mansfield* ſays, "The diſability to purſue the voyage ſtill continued;" and in another place, p. 697. he cites *Le Guidon* to prove that a right to abandon ariſes, not only upon a capture, but "any other ſuch diſturbance as defeats the voyage, or makes it not worth while or worth the freight to purſue it." And in *Cazalet* v. *St. Barbe*, 1 *T. R.* 187. Mr. Juſtice *Buller* ſays, that the policy "is an inſurance on the ſhip for the voyage." In *M'Andrews* v. *Vaughan*, *Park's Inſur.* 115. Lord *Mansfield* ſays, that either the voyage muſt be loſt or the cargo deſtroyed; and to the ſame effect is his language in *Milles* v. *Fletcher*, *Doug*. 231. The caſe of *Manning* v. *Newnham*, *Park's Inſur*. 168. is deciſive. That was an inſurance from *Tortola* to *London* upon ſhip, freight, and goods, warranted free from particular average. The ſhip, ſoon after leaving *Tortola*, was ſo much damaged by ſtormy weather that ſhe was obliged to put back, and it being found upon ſurvey that ſhe was incapable of proceeding with her cargo to *London*, the ſhip and cargo were ſold, and an action brought againſt the underwriters for a total loſs. Lord *Mansfield*, in delivering his opinion, ſays, "If by a peril inſured the voyage is loſt it is a total loſs; otherwiſe not:" and again, "It is a contract of indemnity, and the inſurance is that the ſhip ſhall come to *London*." With reſpect to the caſe of *Pole* v. *Fitzgerald*, *Willes*, 641., which was an inſurance upon a ſhip for four months, bound upon a cruiſing voyage, with a warranty againſt all average, though the cruiſing was prevented by one of the perils within the policy, yet the ſhip was in ſafety at the end of the four months; which was equivalent to an arrival at the deſtined port, where the inſurance, inſtead of being for a certain time, is to a particular port. Admitting that the firſt notice of abandonment was premature, yet when intelligence arrived of thoſe circumſtances which entitled the Plaintiff to claim payment for a total loſs, it was ſufficient for him

to demand such payment, without giving a fresh notice of abandonment. In the cases where the want of a notice of abandonment has precluded the assured from recovering, the assured has neglected to make his election sufficiently early; whereas in the present case the Plaintiff made his election and gave notice to the underwriters upon the first receipt of the intelligence respecting the state of the ports of *Naples*.

Cur. adv. vult.

The opinion of the Court was this day delivered by

Lord ALVANLEY Ch. J. The question for our determination is, Whether the circumstances which have happened amount to a total loss within the policy? The policy includes capture and detention of princes, and any loss which necessarily arises from such acts is a loss within the policy. But it has appeared to me that where underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured. If they could, the same principle would have applied in case information had been received at *Falmouth* that the ship could not safely proceed to *Naples*. In *Goss* v. *Withers*, *Hamilton* v. *Mendez*, and *Milles* v. *Fletcher*, the principles by which a total loss is to be ascertained are clearly laid down. It is there said, "that if the voyage be lost or not worth pursuing, if the salvage be high, if farther expence be necessary, if the insured will not at all events undertake to pay that expence, &c. the insured may abandon, notwithstanding a re-capture." But the doctrine thus laid down is only applicable to cases in which the loss is occasioned by a peril insured against; which, as it appears to me, must be a peril acting upon the subject insured immediately, and not circuitously, as in the present case. Without entering, therefore, at present into the question which has arisen in another case (*a*), how far what has happened can be considered as a total destruction of the thing insured, I think that the detention of the cargo on board the ship at a neutral port in consequence of the danger of entering the port of destination cannot create a total loss within the meaning of the policy, because it does not arise from a peril insured

(*a*) *Dyson* v. *Rowcroft*. See *post*, *Trin.* Term.

against

HARRISON v. ROBINSON.

against. This is an insurance upon an article from *England* to *Naples*, warranted free from particular average. The Plaintiff therefore cannot recover, unless the article be totally lost by a peril within the policy; and such peril must, as I think, act directly and not collaterally upon the thing insured. I much doubt whether if a verdict had been found for the Plaintiff, judgment might not have been arrested. With respect to the case of *Manning* v. *Newnham* it may be observed, that Lord *Mansfield* expressly decides it upon the ground of the voyage being lost by one of the perils insured against, namely, by tempestuous weather. The words of Lord *Kenyon* in *M'Andrews* v. *Vaughan*, in which he lays down that the insured may recover for a total loss if the voyage be lost, must be taken with reference to the case before him, in which the injury arose from capture. The case of *Cocking* v. *Fraser*, *Park's Insur.* 114. is an extremely strong authority to shew that if the article insured (being one of those mentioned in the memorandum) remain in specie, the assured cannot recover, though it be rendered totally useless, and never reach the port of destination. But that case did not involve the question upon which this case turns, namely, Whether the loss were occasioned by a risk within the policy? Here, without entering into the question how far the cargo was totally lost, the claim made by the assured arises from the ship not proceeding to that port to which she was destined. Had she proceeded to *Naples* the loss insured against might have arisen. If we were to decide that the sale at *Port Mahon* was a total loss within the policy, it would afford to owners insuring cargoes of the description specified in the memorandum the opportunity of creating imaginary dangers whenever the cargo was not likely to reach the port of destination in a sound state, and, by giving notice of abandonment, to throw a loss upon the underwriters to which they are not liable by the terms of the policy. We are therefore of opinion that the verdict was right.

Per Curiam, Rule discharged.

1803

May 20th.

An insolvent discharged under the 41 Geo. 3. c. 70. cannot be holden to bail on a bill drawn and indorsed over by him previous to the 1st of *March* 1803, though not due till after that period.

SHARPE *v.* IFFGRAVE.

THIS was an application by the Defendant to be discharged out of the custody of the sheriff of *Middlesex*, because the debt for which he had been arrested in this action accrued previous to his discharge under an insolvent act.

The circumstances of the case were as follow: On the 24th of *February* 1801, the Defendant drew a bill of exchange (upon which he was now in custody), payable to his own order two months after date, which was accepted by one *Godfrey*, and by him indorsed to the Plaintiff before the 1st of *March* in the same year, who indorsed it over: when the bill became due the Plaintiff paid it to the then holder. On the 1st of *March* 1801, the statute 41 *Geo.* 3. *c.* 70. passed, under which the Defendant was discharged as an insolvent. The 34th section of that act provides that no person entitled to the benefit of that act shall at any time thereafter be imprisoned by reason of any judgment or decree obtained for payment of money, "or for any debt, bond, damages, contempts for non-payment of money, costs, sum or sums of money *contracted, incurred, occasioned, owing or growing due*, before the 1st of *March* 1801," and empowers the Judges of the court out of which the process issues to discharge any such person, if arrested, and to award him reasonable costs.

Best Serjt. in support of the rule now insisted, that as the bill was indorsed to the Plaintiff before the 1st of *March* 1801, though it was not till after that time that he was obliged to pay the amount to his indorsee, the Defendant was protected by the words of the 34th section of the act, which discharges persons taking the benefit of that act, not only from all debts due before the 1st of *March*, but also from all demands occasioned by engagements entered into before that time. He observed, that in cases of bankruptcy, it was undoubtedly true that the bankrupt was not discharged by his certificate, unless the person calling upon him had been so far damnified before the bankruptcy as to have had a right to prove under the commission: but that those cases had always been considered peculiarly hard upon the bankrupt, and therefore the Court would not extend the rule to the present case in opposition to the words and plain intent of the legislature to dis-

charge

charge the persons of insolvents from all causes of action arisi upon contracts made before the passing of the act. He added, that the case of *Howis* v. *Wiggins*, 4 *T. R.* 714. had been much doubted (*a*), and urged that as the Defendant's person only was discharged by this act, that circumstance ought to induce the Court to put a favourable construction upon its provisions.

SHARPE v. ISGRAVE.

Vaughan Serjt. *contrà*, insisted that even the word "occasioned" could not operate to discharge the Defendant, because, the engagement being merely conditional, no debt was occasioned to him until default had been made by the acceptor, which was not until after the 1st of *March*.

The Court said, they should take the opinion of the other Judges upon this point, as it was of importance that an uniform construction should prevail upon the subject.

And on this day they said, that as the bill was drawn and indorsed before the 1st of *March*, that was the contract upon which the Debt arose, and consequently the liability of the Defendant was occasioned by that engagement.

Rule absolute.

(*a*) See the opinions of Mr. Justice *Lawrence* and Mr. Justice *Grose*, in *Cowley* v. *Dunlop*, 7 *T. R.* p. 565.

GRAY and Another *v.* SIDNEFF.

May 23.

No addition having been given to the Defendant either in the recital of the writ or in the subsequent part of the declaration, the Defendant pleaded the statute of additions 1 *H.* 5. in abatement, and prayed judgment of the declaration. The Court held the plea a nullity, and gave leave to the plaintiff to sign judgment.

THE declaration in this case was as follows: "*London*, to wit. *Simeon Sidneff* was attached to answer *George Gray* and *John Gray* in a plea of trespass on the case: and whereupon the said *George* and *John* by *T. L.* their attorney complain, that whereas the said *Simeon*," &c. (proceeding with the common counts in *indebitatus assumpsit*).

The Defendant pleaded thus: "And the said *Simeon* in his own proper person comes and prays judgment of the said declaration, because, he says, that by a certain act of parliament made and passed at the parliament holden at *Westminster* in the third week of *Easter*, in the first year of the reign of our late Sovereign Lord *Henry* the Fifth, late King of *England*, it was (amongst other things) ordained and established, That in every original writ of actions, personals, appeals, and indictments, and in which the

 exigent

1803. GRAY and Another v. SIDNEFF.

exigent should be awarded in the names of the Defendants, in such writs, original appeals, and indictments, additions should be made of their estate or degree or mystery, and of the towns or hamlets or places and counties of the which they were or be, or in which they be or were conversant; and if by process upon the said original writs, appeals, or indictments, in the which the said addition be omitted, any utlagaries be pronounced, that they be void, frustrate, and holden for none; and that before the utlagaries pronounced, the said writs and indictments shall be abated by the exception of the party where in the same the said additions be omitted: Wherefore, inasmuch as in the name of him the said *Simeon* addition is not above made of his estate or degree or mystery, he the said *Simeon* prays judgment of the said declarator, and that the same be quashed," &c. A rule *nisi* having been obtained, calling on the Defendant to shew cause why the Plaintiff should not be at liberty to sign judgment as for want of a plea,

Williams Serjt. now shewed cause. It must be admitted that the 1 *H.* 5. *c.* 5. is still in force, for there are many pleas framed upon that statute to be found in *Rastall*, *Cliff*, and *Lilly*, tit. *Abatement*. So in *Bennett* v. *Purcell*, 2 *Ld. Raym.* 849. it was held by *Holt* Ch. J. that upon original where process of outlawry lies, the addition must be given because required by the stat. of *H.* 5. A plea therefore which is founded on that statute cannot be treated as a nullity. If it be said that the only way by which the Defendant can take advantage of the want of addition is by pleading in abatement as for a variance between the writ and the declaration, it may be observed that the presumption is, that the declaration does not vary from the writ till the contrary is shewn. *Earl of Banbury* v. *Wood*, 1 *Salk.* 5. If so, the writ in this case must be presumed to be defective, because the declaration is defective, and being in the Common Pleas is necessarily founded on an original, and therefore within the rule laid down by *Holt* Ch. J. In 2 *Roll. R.* 225. *Johnson*'s case, Ch. J. *Croke*, in arguing upon the necessity of an addition in an indictment, compares it to a declaration, in which he takes it for granted that an addition is necessary. Whether this plea be good or bad, the Court will not take upon themselves to treat it as a nullity, because that mode will deprive the Defendant of his writ of error upon the point on which the Court decide; if the Plaintiff choose to sign judgment as for want of a plea, he will do it at his

his peril, but the Court will not sanction that measure by acceding to this application. Indeed in *Shelly* v. *Wright*, *Barnes*, 338. a similar application was refused, the Court observing that the Plaintiff might demur if he thought fit. It has also been objected, that this plea should have been verified by affidavit, and that was one of the grounds upon which this application was made to the court. But the statute of *Anne* (*a*), which requires an affidavit of matters pleaded in abatement, extends only to such matters as are *dehors* the record, and not to such matters as will appear to the court upon inspection of their own proceedings. *Hughes* v. *Alvarez*, 2 *Ld. Raym.* 1409. [The Court agreed to this, and expressed their opinion that no affidavit was necessary in this case.]

Bayley Serjt. in support of the rule. The statute of additions only requires that the Defendant's addition shall be inserted in the writ, whereas the plea now before the court prays judgment, because the addition of the Defendant is not inserted in the declaration. The only object of the plea is to delay the Plaintiff, and if sanctioned by the Court may be pleaded to every declaration now in the office; for it has not been the custom to introduce the Defendant's addition into the declaration of late years, though formerly it was done. The Court however will not hold the objection valid without production of the writ. Indeed, in a case where a declaration began, "*A. B.* was attached to answer," instead of "summoned to answer," and the Defendant demurred on that ground, the Court of King's Bench said they would not act upon the recital in the declaration, but would presume that the proper process was used, till the writ was produced and demonstrated the contrary. In answer to the observation, that by acceding to this application the Court will deprive the Defendant of his writ of error, it is to be recollected that the same consequence ensues in every case where judgment is signed as for want of a plea, on the ground of the plea being a nullity. Now there are many cases in which the Court have granted similar applications; as in *Cave* v. *Aaron*, 3 *Wils.* 33. where a plea of judgment recovered was set aside because pleaded after the Defendant had entered into terms to plead issuably. And the same has been done in the King's Bench with respect to a plea of the statute of limitations at the time when that

(*a*) 4 *Ann.* c. 16. *s.* 11.

1803.
Gray and Another v. Sidneff.

plea was held not to be an issuable plea. [*Chambre* J. Can you cite any instance in which it has been done, unless where the party pleading the insufficient plea has been under terms? The defect in this plea is substantial, and the proper mode of taking advantage of that defect is to demur.] In *Murray* v. *Hubbart*, *ante*, vol. 1. p. 645. a plea in abatement, stating a variance between the process and the declaration, was treated as a nullity, and judgment signed accordingly; and yet in that case the Defendant was not under terms.

Williams in reply observed, that in *Murray* v. *Hubbert* the Court refused to sanction an application for setting aside the plea as a nullity, but put the Defendant to sign judgment at his peril.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord Alvanley Ch. J. As this case has been argued upon the motion now before the Court, we do not think it right to withhold our judgment at present until the Plaintiff shall have done that which he now seeks our leave to do, though perhaps it would have been the more regular mode of proceeding for him to have signed judgment as for want of a plea without any application to the Court, and thus have put the Defendant to move to have that judgment set aside. The plea in this case, after stating the statute of additions, prays that the declaration may be quashed. I have not found a single case in which it has been held necessary to insert an addition in the declaration. The writ and declaration ought to agree, and formerly if there was any essential variance between them, advantage might have been taken of that circumstance. It remains to be proved however that any repugnance exists in the present case. It never has been the practice for many years to insert an addition in declarations in this Court, and the question now is, Whether the plea which has been put in can be received? That question appears to me to have been decided by the case of *Murray* v. *Hubbart*. There an application being made to the Court for leave to treat a plea in abatement as a nullity, the court refused to make any rule in that stage of the proceedings, but judgment having been signed as for want of a plea, the question came before the Court, and was decided upon grounds which are extremely applicable to the present case. Lord Ch. J. *Eyre* there

says,

1803. GRAY and Another v. SPURRIER.

says, that "so long as it is the practice of the Court to issue the mesne process first, and to allow an original to be sued out afterwards, if necessary to substantiate the proceedings, no advantage can be taken after appearance of a misnomer in the mesne process." In that case the plea assumed, that the original writ had misnamed the Defendant, because the declaration recited that he was arrested by a different name from that by which he was declared against. It has long been the practice not to grant oyer of original writs; and though perhaps such refusal may be considered in the first instance to have been a strong measure, yet it was the necessary consequence of assuming a jurisdiction without original. From that moment it became necessary to treat all pleas of this sort as absolute nullities, otherwise the fiction under which the Court assumed its jurisdiction would have been turned into a mere engine of delay. When courts adopt a fiction they must necessarily support it. The Court of King's Bench would not allow a party to say that he was not in the custody of the marshal, nor the Court of Exchequer that he was not the King's debtor. By this doctrine no right is taken away from the subject, nor is he proceeded against in any way injurious to himself. If such a plea were to be allowed, the Master of the Rolls would issue a new writ agreeable to the declaration. If the Court thinks itself at liberty to proceed without an original, it will never permit a mode of proceeding to be adopted which will have the effect of compelling the Plaintiff to sue out that original which the Court feels itself justified in acting without. We think therefore that as the plea amounts to a mere nullity, the Plaintiff is at liberty to sign judgment for want of a plea.

Rule absolute.

DANN v. SPURRIER.

May 23d.

If a lease be granted for 7, 14 or 21 years, the lessee has the option at which of the above periods the lease shall determine.

THE following case was sent by the Lord Chancellor for the opinion of this Court:

The Defendant on the 14th *October* 1791 entered into the following agreement with one *William Atkinson*:

"*London*, 14th *October* 1791.

"Memorandum. I *William Atkinson* of *Saint Olaves*, *Southwark*, have this day agreed to take on lease of *John Spurrier* the dwelling-

1803. DANN v. SPURRIER.

house and premises now occupied by him in *Old Broad-street*, together with a bed-room now in the possession of Mr. *Amory*, and which bed-room is over the one now used by the said *John Spurrier* himself, to hold for 7, 14, or 21 years, at the yearly rent of one hundred and fifty pounds, payable half yearly, including all taxes which are to be paid by the said *John Spurrier*, the term and rent to commence from *Christmas* next, the usual fixtures, carpets, and floor-cloths fitted to the floors, to be taken and paid for at a fair valuation by the said *William Atkinson*. An outside door to be put to the kitchen entrance of the house at the expence of the said *John Spurrier*." And on the back of the said agreement is the following memorandum: "I agree to let the premises mentioned "on the other side hereof upon the terms and conditions expressed therein. *John Spurrier*." The said *William Atkinson* accordingly took possession of the premises, and afterwards disposed of his interest therein to the Plaintiff *Richard Dann*, who took possession thereof and paid the rent.

The Defendant, on the 20th day of *June* 1798, duly gave notice to the Plaintiff to quit the premises at *Christmas* then next, which he refused to do, alleging that the Defendant had no right to determine the agreement at the expiration of the first seven years, but that the tenant only had that right; in consequence of which the Defendant, in *Hilary* term 1799, duly commenced an action of ejectment in the Court of King's Bench, in order to obtain possession of the said premises; upon which the Plaintiff and the said *William Atkinson*, in *Hilary* term 1799, filed a bill in the High Court of Chancery against the said Defendant for a specific performance of the said agreement, and that the Defendant might be compelled to execute a lease of the premises to them or one of them for 21 years. The question for the opinion of the Court was, Whether upon the legal construction of the said agreement the Defendant had a right to determine the term of 21 years, thereby agreed to be granted at the end of the first seven years?

Shepherd Serjt. for the Plaintiff. The question to be considered in this case is precisely the same as if a lease had actually been granted, and therefore it will be for the Court to decide, Whether, if a lease had been granted for 21 years, determinable at the end of seven or 14 years, such lease would have been determinable at the option either of the lessor or lessee, or of the lessee only? In *Goodright d. Hall* v. *Richardson*, 3 *T. R.* 462. the Court of

7 King's

King's Bench decided that a leafe for three, fix, or nine years, was a leafe for nine years, determinable at the 3d or 6th year at the option of either party. During the argument a cafe of *Ferguson* v. *Cornish* was cited, as having been decided by Lord *Mansfield*, and in which it was fuppofed to have been doubted by him whether a leafe for feven, 14, or 21 years, was not void for uncertainty after the feven years. But that was a miftake; and indeed though the Court in *Goodright d. Hall* v. *Richardson* intimated that the leafe was determinable at the option of either party at the end of the 3d or 6th year, yet it is obfervable that any opinion on that point was extrajudicial, for the only point in difpute was, Whether the leafe was not void for more than three years? It is open, therefore, for me to contend that this fpecies of leafe is determinable at the option of the leffee only; and indeed if that is not the conftruction put upon it the provifion will be wholly nugatory, inafmuch as the leffor, to whom fuch an option is fuppofed to be referved, is in no better condition with than without it, becaufe he may always renew if he pleafes. Befides, fuch words as thefe are to be conftrued moft favourably for the grantee. Indeed the plain intent of the provifion is to encourage the leffee to expend more money upon the premifes than he would otherwife do. If, therefore, the intent of the parties can be fairly collected, that intent muft prevail; and if no intent can be collected, then the leafe muft be conftrued moft ftrongly againft the leffor.

Heywood Serjt. *contrà*. This queftion arifes not on a leafe, but on an agreement for a leafe. Indeed if it were in form a leafe, ftill the queftion would occur, In whom the option of determining that leafe is vefted? In anfwer to the obfervation, that the agreement is to be conftrued moft ftrongly againft the Defendant according to the common rule adopted in cafes of grantor and grantee, it is to be remembered, that the party applying the agreement is the Plaintiff, and that the undertaking being completely mutual, the analogy does not exift. It has been contended that unlefs the option of determining or continuing the leafe be given to the leffee folely the provifion will be nugatory; but that mode of reafoning is very fallacious, for at all events it faves the trouble and expence of a renewal, where both parties are inclined to renew. Tenancies at will are determinable at the option of either party; now the fpecies of leafe under confideration of the Court is framed on an analogy to that fpecies of holding, for though both parties are bound by their agreement up to a certain period, yet

 when

when that period arrives each may exerciſe his will whether the relation of landlord and tenant ſhall continue any longer, with this reſtriction only, that if they chooſe it ſhould continue, it muſt then continue for another definite period. The caſe of *Goodright d. Hall* v. *Richardſon*, though ſubject to the obſervation which has been made upon it, is nevertheleſs a very ſtrong authority in favour of the Defendant, for Lord *Kenyon* ſays, "it was intended that this leaſe ſhould take effect for three years at all events, and that it ſhould be in the election of either of the parties to put an end to it at that time or at the end of ſix years, giving reaſonable notice to the other. It is like a leaſe for a year, and ſo from year to year, where, if the leſſee wiſh to determine it at the end of the year, he muſt give reaſonable notice to the other party."

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord Alvanley Ch. J. This queſtion turns upon the legal conſtruction of the agreement ſtated in the caſe. It is to be obſerved, that the agreement is not an offer on the part of the leſſee to take a leaſe for ſeven or a leaſe for 14, or a leaſe for 21 years, but it is an offer to take a leaſe with an *habendum*, as ſtated by the leſſee in his propoſals, *viz.* to hold for ſeven, 14, or 21 years. The leſſor having aſſented to let the premiſes upon the terms and conditions propoſed, it muſt now be taken as if a leaſe had been actually granted containing ſuch an *habendum* as that ſtated in the propoſals. It is for us, therefore, to determine what is the legal conſtruction of ſuch an *habendum* in a leaſe. It has been contended that where the terms are not defined, either poſitively or by any circumſtance, but an alternative is ſtated which cannot be made certain without the option of one of the parties, the leaſe is determinable at the option of either. There ſeems to be great authority for ſuch a propoſition, for undoubtedly Lord *Kenyon* and Mr. Juſtice *Buller* both intimate in the caſe of *Goodright d. Richardſon* v. *Hall*, that the option would be in either party. But it muſt not be forgotten (for I wiſh it to be underſtood that had the judgment of the Court in that caſe proceeded upon the point alluded to, it would probably have guided our judgment in the conſtruction of ſuch doubtful words as thoſe which occur in this caſe) that Lord *Kenyon* and Mr. Juſtice *Buller* only threw out their opinion *obiter;* had it been otherwiſe, there are no authorities, particularly that

that of Lord *Kenyon*, upon a point of law arising out of real property, to which I should be more disposed to defer. The lease in that case was for three, six, or nine years, determinable in the years 1788, 1791, and 1794, and the construction put upon that lease lease was, that it gave an option to either party, but that such option must be exercised with reasonable notice previous to the expiration of any of the terms; and as reasonable notice had not been given, the Court held that the lease was not determined. With respect to the case of *Ferguson* v. *Cornish*, there referred to, it is surprising that any doubt should have arisen; and indeed it does not appear that any doubt was entertained by the Court. A lease having been granted for seven, 14, or 21 years, and an action of covenant having been brought against the lessee during the first seven years, it was contended by the lessee that it was no lease at all, according to the old doctrine, that a lease uncertain in its commencement or duration was void. Lord *Mansfield* held, that at all events it was a good lease for seven years. These two cases decide nothing with respect to the point now before the Court. It remains therefore for us to consider, notwithstanding the opinions thrown out in these cases, Whether, according to the construction which deeds between lessor and lessee have received, the power of determining the lease in this case must not be confined to the lessee? Much is to be found in the books relative to the construction of deeds which contain covenants in the alternative; from all of which the rule appears to be perfectly clear, that if a doubt arise as to the construction of a lease between lessor and lessee, the lease must be construed most beneficially for the latter. It is laid down in the books, that if a man covenant to do one of two things, and he does either, the covenant is not broken. Thus in 1 *Roll. Abr.* tit. *Condition*, (Y), *pl.* 3. *fo.* 446., it is said that if a condition be that the obligor shall enfeoff a man of lands in *D.* or *S.* upon request, the obligor has his election of which of the two he shall enfeoff him. So in *pl.* 4. it is laid down that if the condition be that the obligor shall pay 20*l.* or a pint of wine upon request, he has his election. This election, however, is said to depend upon which of the two parties to the contract is to do the first act. Therefore, if a man make a grant in the alternative, and the grantee enter into possession, the grantor is no longer at liberty to exercise an option. So if *A.* says to *B.*, I grant you a horse out of my stable, he puts it in the power of *B.* to take which horse he shall think

1803.

DANN v. SPURRIER.

think proper. In the Bishop *Bath's* case, 6 *Co.* 35. *b.*, it was resolved that the construction of law as to the commencement of leases should be taken strongest against the lessor, and most beneficially for the lessee. Another strong authority to this effect is Sir *Rowland Heywood's* case, 2 *Co.* 35. *a.*, where one having demised, granted, bargained, and sold certain lands, and the question being, Whether the grantee should take by demise or by bargain and sale? it was held that the grantee had his election. In *Dyer*, 261. *b.* the Court of Common Pleas held that where a lease of premises, which had been granted for 31 years, was granted to a new lessee, a *die confectionis præsentium termino prædicto finito usque ad finem termini* 31 *annorum tunc immediate sequentium*, that the term should commence in possession from the end of the former term, and not from the making of the deed, and the reason which they give for the opinion is, that every grant shall be expounded most favourably for the grantee, and if the lease were to commence from the making of the deed the lessee would only have four years. It is true that *Brown* doubted upon this point, and that the Court of King's Bench came to a different decision. But although the Court of King's Bench might not think proper to go so far in favour of the lessee as the Court of Common Pleas did, yet it does not follow that they were disposed to deny the rule of construing leases favourably for the lessee; for where two periods are mentioned in a deed, from which the commencement of a lease is to take place, the legal construction is, that it shall commence from which of the two periods shall first happen; and so it was determined in *Dyer*, 312. *b. in marg.* This principle of exposition is sound; but it is not applicable to this case, which does not depend upon the priority of different periods, but upon the question, In whom the option of deciding upon the alternative is vested? The lease agreed for in the present case was for seven, 14, or 21 years. An option therefore was certainly intended. If then the principle be just, that a lease is to be construed most favourably for the lessee, why are we to determine in this instance that the option is in the lessor? If indeed a provision had been inserted that the lease should be determinable at the option of either party, the lessor would have been entitled to take advantage of it; but where no such proviso is inserted, the true construction seems to be that the lessee is entitled, at his option, to take that term which is most beneficial to himself. Notwithstanding, therefore, the opinions which have been referred to

of Lord *Kenyon* and Mr. Justice *Buller*, we think that where no custom of the country exists upon the subject, the principle of construing deeds between lessor and lessee requires us to hold, that where a grant is made in an alternative which cannot be determined by extrinsic circumstances, the option is left in the lessee. And we shall certify accordingly. There is a case of *Keble* v. *Hall*, *Litt.* 363. 370., which bears very strongly upon this subject. In that case, a lease having been granted to *A.* and *B.* for forty years if they and three others, or any of them, should so long live; a second lease was granted "*habendum* from the administration (*a*), which should be in the year 1568, or from and after the surrender, forfeiture, or other determination of the said lease to *A.* and *B.*;" and some of the persons for whose life the first lease was granted having survived the year 1568, a question arose when the second lease ought to commence. The case indeed does not appear by the report to have been finally determined, but the Court strongly inclined to think the lessee should have his election, because that construction ought to be adopted which is most favourable for lessees.

(*a*) This seems to be misprinted in *Litt.* for Annunciation.

BEALE *v.* THOMPSON.

May 23d.

Qu. whether the crews of the *British* ships detained in *Russia* under the orders of the *Russian* Government in the year 1800 were entitled to wages for the time during which the ships were so detained?

ASSUMPSIT for wages due to the Plaintiff as a mariner on board the *Isabella*, on a voyage from the port of *London* to *Petersburgh*, and from *Petersburgh* back to *London*, at 5*l.* *per* month. The declaration alleged the safe arrival of the *Isabella* at *Petersburgh*, and her return from thence to *London*, "during the whole of which said voyage the Plaintiff continued and remained in and on board the said ship, in the service of the said Defendant as such seaman and mariner as aforesaid." There were also counts for wages as a seaman, on a *quantum meruit*, for money paid, laid out, and expended, for money had and received, and on account stated.

The cause was tried before Lord *Alvanley* Ch. J. at the *Westminster* Sittings after last *Michaelmas* term, when the following

1803

BEALE v. THOMPSON.

special verdict was found. The Plaintiff, a *British* (a) seaman, on the 14th day of *July* 1800, executed articles to serve as a seaman in a *British* ship called the *Isabella*, of which the Defendant was master, at the wages of 5 *l. per* month, on a voyage from *London* to *Petersburgh*, and from thence to *London*, and that in consideration of the said monthly wages the Plaintiff should and would perform the above mentioned voyage; and the Defendant did hire the Plaintiff for the said voyage, at such monthly wages, to be paid pursuant to the laws of *Great Britain*; and the Plaintiff did promise and oblige himself to do his duty and obey the lawful commands of the officers on board the said ship or boats thereunto belonging as became a good and faithful seaman and mariner, and at all places where the said ship should put in or anchor at during the said voyage to do his best endeavours for the preservation of the said ship and cargo, and not to neglect or refuse doing his duty by day or night, nor go out of the said ship on board any other vessel, or be on shore under any pretence whatsoever till the voyage should be ended and the ship discharged of her cargo, without leave first obtained of the master, captain, or commanding officer on board; and in default thereof it was agreed that he should be liable to the penalties mentioned in the 2 *Geo.* 2. *c.* 36. and the 37 *Geo.* 3. *c.* 73.; and further that 24 hours' absence without leave should be deemed a total desertion, and render the Plaintiff liable to the forfeitures and penalties contained in the acts above recited; and also that the Plaintiff should not demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above mentioned port of discharge, and her cargo delivered; and that if the Plaintiff should well and truly perform the above mentioned voyage he should be entitled to the wages or hire that should become due to him pursuant to the said articles. The Plaintiff accordingly sailed on board the said ship, which arrived at *Petersburgh* on or about the 18th day of *October* in the same year, and continued there in prosecution of the purpose of the voyage until the 5th day of *November* following, on which day the following order was issued by the *Russian* Government: "Whereas we have learned that the island of *Malta*, lately in the possession of the *Hercule*, has

(a) There was a similar special verdict found in a case of *Johnson* v. *Broderick*, with this only difference, that the Plaintiff there was a foreign seaman. Both special verdicts were argued and decided together.

been

been surrendered to the *English* troops; but as yet it is uncertain whether the agreement entered into on the 30th *December* 1798 will be fulfilled, according to which this island, after its capture, is to be restored to the order of *Saint John* of *Jerusalem*, of which His Majesty the Emperor of all the *Russias* is Grand Master, His Imperial Majesty being determined to defend his rights, has been pleased to command that an embargo shall be laid on all *English* ships in the ports of his empire till the above-mentioned convention shall be fulfilled." After this order guards were placed along the shore to prevent the crews from escaping from their respective ships until the 10th of the same month of *November*, when such part of the crew of each ship as were *British* subjects were taken out by a *Russian* guard and marched into the interior of the country, and the foreign seamen, being claimed by their consuls, were put on shore and set at liberty. On the 18th and 21st days of the said month of *November*, the following proclamations appeared in the *Petersburgh Court Gazette*: "The crews of the two *English* ships in the harbour of *Narva*, on the arrival of a military force to put them under arrest, in consequence of the embargo laid on them, having made resistance, fired pistols, and forced a *Russian* sailor into the water, and afterwards weighed anchor and sailed away; his Imperial Majesty has been pleased to order that the remainder of the vessels in that harbour shall be burned." "His Imperial Majesty having received from his Chamberlain *Stalinskoi* at *Palermo*, an account of the taking of *Malta*, has been pleased to direct that the following note shall be transmitted to all the Diplomatic Corps residing at his Court by the Ministers presiding in the College for Foreign Affairs, Count *Rotoptskin* and the Vice Chancellor Count *Panin*:—His Majesty the Emperor of all the *Russias* has received circumstantial accounts respecting the surrender of *Malta*, by which it is actually confirmed that the *English* generals, notwithstanding the repeated remonstrances on the part of His Majesty's Ministers at *Palermo*, as well as from the Ministry of His *Sicilian* Majesty, have taken possession of *Valetta*, and of the island of *Malta*, in the name of the King of *Great Britain*, and have hoisted his flag only. His Imperial Majesty's just indignation having been raised by this violation of good confidence, he has resolved not to take off the embargo that has been laid on all *English* vessels in the *Russian* ports until the agreement of the con-

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1803.

BEALE v. THOMPSON

vention concluded in 1798 shall have been completely carried into execution." On the 14th of *January* 1801 His *Britannic* Majesty in Council issued the following order: "Whereas His Majesty has received advice that a large number of vessels belonging to His Majesty's subjects have been and are detained in the ports of *Russia*, and that the *British* sailors navigating the same have been and are detained as prisoners in different parts of *Russia*, and also that during the continuance of these proceedings a dangerous confederacy of a hostile nature against the just rights and interest of His Majesty and his dominions has been entered into with the Court of *Saint Petersburgh* by the Courts of *Denmark* and *Sweden* respectively, His Majesty, with the advice of his Privy Council, is thereupon pleased to order, as it is hereby ordered, that no ships or vessels belonging to any of His Majesty's subjects be permitted to enter and clear out for any of the ports of *Russia*, *Denmark*, or *Sweden*, until further order. And His Majesty is further pleased to order, that a general embargo or stop be made of all *Russian*, *Danish*, and *Swedish* ships and vessels whatsoever now within or which hereafter shall come into any of the ports, harbours, or roads, within the united kingdom of *Great Britain* and *Ireland*, together with all persons and effects on board of the said ships and vessels; but that the utmost care be taken for the preservation of all and every part of the cargoes on board any of the said ships and vessels, so that no damage or embezzlement whatever be sustained; and the Right Honorable the Lords Commissioners of His Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary direction herein as to them respectively appertain." On the 16th of *January* 1801 His *Britannic* Majesty in Council issued the following order: "Whereas His Majesty has received advice that a large number of vessels belonging to His Majesty's subjects have been and are detained in the ports of *Russia*, and that the property of His Majesty's subjects in *Russia* has, by virtue of several orders and decrees of the *Russian* Government, particularly one bearing date the 29th of *November* last Old Stile, (corresponding with the 10th of *December* New Stile,) been seized and directed to be applied in violation of the principles of justice and of the rights of the several persons interested therein, His Majesty, with the advice of his Privy

1803.

BEALE v. THOMPSON.

Council, is thereupon pleased to order, as it is hereby ordered, that no bills drawn since the said 29th of *November* Old Stile (corresponding with the 10th of *December* New Stile,) by or on behalf of any persons being subjects of or residing in the dominions of the Emperor of *Russia*, shall be accepted or paid without licence from one of His Majesty's Principal Secretaries of State first had in that behalf, until further signification of His Majesty's pleasure, or until provision shall be made in respect thereof by act of parliament; whereof all persons concerned are to take notice, and govern themselves accordingly." The captain and the *British* crew of the *Isabella* remained up the country till the 28th of *May* in the succeeding year, during which time they were kept within certain bounds, and, from the time they were taken from their ships, were treated in other respects as if they had been prisoners of war. On the 28th of *May* in the succeeding year, the captain and such of the crew as had been marched up the country, having returned on board the ship, the Plaintiff joined them and proceeded on the voyage to *London*. The ship sailed to *Petersburgh* in ballast, to bring a cargo from thence to *London*, and was to be paid freight for that cargo by the ton. The Plaintiff did his duty as a seaman on board the ship during the said voyage, and the ship received the same freight as if she had not been detained, and no more. After the captain and crew returned on board the said ship, to wit, on the 5th *June* 1801 O. S., the *Russian* Government issued the following order: "Quoique l'intention magnanime de S. M. l'Empereur de toutes les *Russies* de rendre pleine et entière justice aux sujets *Britanniques* qui ont essuyé des pertes pendant les troubles qui ont alteré la bonne intelligence entre son empire et la *Grande brétagne* soit deja constatée par les faits, S. M. I. ne consultant que sa loyauté a autorise encore le Plenipotentiaire soussigné à declarer comme il declare par la presente: Que tous les navires, les marchandizes, et les proprietés des sujets *Britanniques*, qui avaient été mis en sequestre sous le dernier regne in *Russie*, seront non seulement fidelement restitués aux dits sujets *Britanniques* ou à leurs commettans, mais que pour les effets qui auroient ete alienés d'une maniere quelconque, et qui ne pourraient plus être rendus en nature il sera accordé aux proprietaires un equivalent convenable lequel sera determiné ulterieurement d'apres les regles de l'équité. En foi de quoi nous plenipotentiaire de S. M. I. de toutes les

1803.

BEALE v. THOMPSON.

Russies avons signé la présente déclaration, et y avons fait apposer le sceau de nos armes. Fait à *St. Petersbourg* le 1/7 *Juin* 1801. (Signé) Le Comte de *Parrin*." This order has not yet been carried into complete effect. No new articles were entered into between the captain and crew. The Plaintiff has received all his wages for the voyage according to the articles, except for the time the captain and crew were so kept out of the said ship.

This special verdict was twice argued; first in *Hilary* term 1803, by *Lens* Serjt. for the Plaintiff, and *Bayley* Serjt. for the Defendant, and now in this term by *Cockell* Serjt. for the former, and *Marshall* Serjt. for the latter.

Arguments for the Plaintiff. The only grounds upon which it can be contended that the Plaintiff ought not to receive wages for the whole time mentioned in the special verdict are, that the contract for wages was either extinguished or suspended by what took place in *Russia*. If the act of the *Russian* Government is to be considered as an embargo, it is clear that the contract for wages was neither extinguished nor suspended. The case of *Hadley* v. *Clarke*, 8 *T. R.* 259. expressly decides that an embargo does not extinguish a contract; and though the embargo in that case lasted two years, still the parties were held liable upon the contract at the expiration of that period. No authority is to be found in contradiction of the law laid down in that case. It appears also from *Molloy*, *b.* 2. *c.* 2. *s.* 3. that freight is due and must be paid notwithstanding an embargo. Now if freight be due, wages must also be due. It can make no difference that the freight was contracted for in this case at so much *per* ton, for if the voyage were put an end to in a case where the freight was payable by the month, all right to freight would equally be extinguished. Lord *Kenyon*, in *Hadley* v. *Clarke*, when speaking of the inconveniences which would arise from holding an embargo to amount to an extinguishment of a contract on a charter party, observes, that such a doctrine would also have the effect of putting an end to all contracts for freight and for wages. Nor was the contract for wages suspended; a contract entire in its nature cannot be suspended and afterwards revived with all its consequences and incidents. There is no instance, either in the law of *England* or in the law maritime, of such a suspension. In *Robertson* v. *Ewer*, 1 *T. R.* 127. it was taken for granted that wages were

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due to the seamen during an embargo; for the only point contested in that case was, Whether the wages growing due during that period, and the provisions expended, were covered by an insurance on the body of the ship. Though the seamen during their detention in *Russia* could not be actively employed, they were bound to wait until their services should be required; but if the embargo be held to suspend the contract, that suspension will operate to divide the contract and create an interval of an uncertain duration, in which the contract may be said to be dissolved *pro hac vice*, renewable whenever the embargo shall cease. In such case, are the seamen at liberty to enter into new engagements, and yet obliged to hold themselves in readiness at a future period to fulfil the remainder of the contract? All contracts for seamen's wages are regulated by the 2 *Geo.* 2. *c* 36. The principal object of that statute was to prevent the desertion of seamen in foreign parts, and to compel them to continue on board and fulfil their contract until the voyage was completed or defeated by capture, or other accident of that kind. Under the 3d section of that act the Plaintiff in this case would have been a deserter, and have forfeited his wages, had he quitted the ship upon the embargo being laid on in *Russia*. If a ship be captured, and afterwards recaptured, the contract is not determined, but the entire freight is due. *Molloy*, *b*. 2. *c*. 4. *s*. 13. The next question is, Whether the act of the *Russian* Government amounted to any thing more than embargo? An embargo is a temporary restraint, adopted for a particular purpose. The ships, cargoes, and seamen, are all taken into the custody of the power which imposes it. But the degree of rigour with which these circumstances may be attended in any particular case will not alter the nature of the act. The essence of an embargo is that it should be a restraint *quousque*. It may or may not terminate in hostility. In the present case it never proceeded beyond an embargo, for restoration was made. The peculiarity of the embargo in question was the hardship imposed upon the seamen. But that circumstance ought to have no operation upon the contract between the seamen and the owner, the latter of whom was not affected by that hardship. Indeed it would be a monstrous proposition to sanction in a court of justice, that if the seamen are treated with extreme cruelty during the continuance of an embargo the contract between them and their owners should be extinguished, and they should lose their

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1803. BLAIR v. THOMPSON.

wages; but that if they were treated with humanity they should be entitled to recover them. Nor can the period for which this embargo continued operate to invalidate the contract, since it was of less duration than that in *Hadley* v. *Clarke*. And it is to be observed, that the act of the *Russian* is expressly stiled an embargo in the edict of the Emperor himself. It is not necessary to entitle a seaman to wages that he should personally serve on board the ship, provided he do such services as the nature of the case will admit of; for in *Chandler* v. *Greives*, 2 *H. Bl.* 606. *in notis*, the Plaintiff recovered the whole of his wages, though, in consequence of illness, he was put on shore at *Philadelphia*. What is to be found in *Valin* upon this subject is not founded upon any general rule of maritime law, but upon the particular ordinances of *France*, which were in many cases made for the purpose of supplying defects in the general law. The cases of the *British* and the foreign seamen must stand upon the same ground: for although one was imprisoned and the other not, and consequently the latter had the actual power of leaving the country and entering into a new service, yet in point of law they were both equally bound to wait for the termination of the embargo, and resume their stations on board the ship whenever that event should take place.

Arguments for the Defendant. The seizure stated in this special verdict amounts to a capture; and is not merely an embargo. But supposing it were an embargo, still the Defendant is not entitled to wages for any longer period than while he served on board. The term "embargo" is derived from a *Spanish* word, and in its original signification imports a prohibition of egress by public authority. The object of an embargo is either to prevent the ships of the power which imposes it from falling into the hands of an enemy, or to detain the ships of foreigners. But an embargo operates merely by way of restraint, and the master and crew are left on board. The former retains the entire management of the ship, may land the cargo, discharge sailors, and do any act but leave the port in which he is confined. In the present case, however, the ships were taken possession of by an armed force, and were not merely restrained by the hand of the custom-house intervening in a civil mode to prevent their egress. If it be said that an embargo is an equivocal act, and must be determined by the motive which gives rise to it, it may be observed, that the motive of the Court of *Russia* can only

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be ascertained by its acts; and those acts form a very authentic exposition of the motives under which the first possession was taken. It appears that the crew were made prisoners, treated as prisoners, and marched up the country. It is clear that the conduct of *Russia* was considered by the Government of this country as amounting to an act of hostility; for in the King's speech of the 2d of *February* 1801 it is stated to be the commencement of a project by the three Northern Powers "to establish a new code of maritime law, inconsistent with the rights and hostile to the interests of this country." A different mode of treatment was adopted towards *British* subjects from that which the subjects of other nations experienced: which clearly proves that the act was intended as a measure hostile to *Great Britain.* All foreign sailors were set at liberty, and the *British* sailor, if he could have escaped from his confinement, might have entered into a new contract, and was not bound to wait till the restriction should be taken off, that being an event which might possibly never happen. Considering the conduct of *Russia* then as an act of hostility, it dissolved the relation between the master and mariner, and either determined the contract or suspended its operation. In the case of *Curling* v. *Long*, *ante*, vol. 1. p. 637. Lord Ch. Justice *Eyre* considered a contract for freight as determined by a capture, though the ship were afterwards recaptured; and it appears from *Chandler* v. *Meade*, cited 2 *Ld. Raym.* 1211. that if a ship be captured and ransomed, the mariner can only recover his wages *pro rata*, if indeed he can recover at all. In the case of capture and ransom the seamen's wages are liable to contribute, and the same seems to be the case upon a capture and recapture. *Abbott on Merchant Ships and Seamen*, *part* 3. *c.* 8. *s.* 14. and *part* 4. *c.* 3. *s.* 2. Freight is due for the use of the ship, and wages for the service of the mariners; but if the ship be taken by force out of the possession of the owners, and the seamen are thereby prevented from performing any service, neither freight nor wages can accrue. Supposing the detention, however, to have been a mere civil embargo, still the Plaintiffs are not entitled to wages during their absence from the ship. Wages are the reward of service, and are payable for no longer time than the service is performed. It is laid down in *Pothier*, tit. *Contrat de Louage*, *No.* 140. that if a person hire himself to a master, and is prevented from performing his service by some power which he cannot resist,

1803.

BEALE v. THOMPSON.

1803. BEALE v. THOMPSON

no wages are due. The right to wages exists no longer than the relation of master and mariner subsists: the moment that is dissolved the wages cease, and whatever puts it out of the power of the mariner to perform his service terminates that relation. Indeed there are cases where the sailor does not earn wages though the relation of master and mariner subsist; where freight is earned, wages are also earned; but where the ship earns no freight, the sailor earns no wages. Thus in the *Marine Ordinances*, tit. *De l'Engagement des Mâtelots*, *Valin*, tom. 1. p. 688. 4to edit. 1766, and *Pothier*, tit. *Louage des Mâtelots*, No. 180. it is stated that where commerce is prohibited at the place of the ship's destination before the commencement of the voyage, the seaman shall be entitled to no wages; whether hired by the month or for the voyage, he shall be paid only for the days employed in fitting out the ship. If this prohibition happen during the voyage, he shall be paid in proportion to the time he has served. And in article 5. of the *Marine Ordinances*, tit. *Louage des Mâtelots*, it is laid down that in case of an arrest of princes before the voyage commenced, no wages will be due except for the days employed in fitting out. But if this be during the course of the voyage the wages of the sailors engaged by the month shall run for half during the detention, while those engaged for the voyage shall be paid according to agreement. The reason of these regulations was, that by the marine law the sailor originally was entitled to nothing, and both *Pothier* and *Valin* treat the indulgence as an innovation. *Pothier* says, that the arrest being by an irresistible power the master cannot be responsible for it, according to the rule *casus fortuiti à nemine præstantur*. If the sailor suffers by this delay, so do the master and owners of the ship. *Pothier*, tit. *Louage des Mâtelots*, No. 182. The observation of *Valin* is, that as to those engaged by the month it would not be just that the owner, who gains no freight during the detention, should pay the sailors their full wages; and, on the other hand, it would not be reasonable that the sailors during the whole time of the detention should do the duty of the ship for their victuals only. It was necessary, therefore, he observes, to adopt some modification; and of this the sailor has no reason to complain. He indeed expresses his surprize that there should be no regulation for the relief of a sailor engaged at a specific hire for the voyage. *Valin*, tom. 1. p. 690. The general rule with respect

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to freight is, that if it be by the month it does not run during a detention, whether that be at the beginning or in the course of the voyage; nor is it augmented if it be a specific sum. *Valin*, tom. 1. p. 627. The law laid down in the case of *Hadley* v. *Clarke* is not to be disputed. There the embargo was only until further order of Council, and the Court determined that it suspended, though it did not dissolve the contract, notwithstanding that it lasted two years. It is singular that any question should have arisen there. But it cannot decide the present case, for it has already been shewn that the mere continuance of the contract of charter-party does not necessarily entitle the sailor to wages.

Cur. adv. vult.

The learned Judges differing in opinion, delivered their sentiments *seriatim* this day.

CHAMBRE J. These are actions for mariners' wages; one of them is brought by a *British* seaman, the other is brought by a foreign seaman. But that circumstance appears to me to make no material distinction between the two cases, and therefore they have been argued as one case, without at all adverting, in the course of the argument, to that distinction. The question that has been argued upon this special verdict is, Whether during the period in which the crews were put under the care of *Russian* guards, and kept in a state of confinement, any wages were earned by the mariners? It is contended, on the part of the Plaintiff, that they ought to recover inasmuch as no fault has been committed by them; they say they have done their duty, and that the owners have earned and received their freight; that the act of the *Russian* Government amounted to no more than an embargo, and was not a capture, and that an embargo is not a dissolution or suspension of the contract, either for freight or wages. On the other hand, the Defendants do not deny that wages were earned while the crews continued on board their respective ships, but they say it was not earned after the crews were taken out and marched up the country, and a seizure made of the ships and property on board; that this detention and imprisonment amounted to more than an embargo, that it was an hostile capture, which either suspended or dissolved the contract with the mariners. For the Plaintiff it has not, I think, been contended that if it was a capture any wages could be earned while such capture continued. The conduct of the *Russian* Government

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1803.

BEALE v. THOMPSON.

on this occasion is novel and unprecedented, and it seems that the case which has arisen out of the conduct of that Government is equally novel. But, exercising the best judgment I can on the circumstances that are stated in this special verdict, it is my opinion that the acts of the *Russian* Government towards the ships and crews were hostile, in consequence of which the ships and cargoes are to be considered as under capture and not under an embargo. I concur with the Defendants' counsel in thinking that the term "embargo" implies only a temporary restraint of the departure of the ship; and I cannot assent to the proposition that the Defendants are bound to prove an absolute intention at the time to confiscate and condemn the property at all events, or that in the present case it will vary the hostile nature of the act if it should appear that there was a professed or real design to restore the property and release the prisoners in an event that might happen, possibly after making the seizure of the ships and the ill-treatment of the crews part of the means of procuring that event. In considering the nature of these proceedings of the *Russians* I look at the acts themselves, and not at the language of their orders. Their calling the seizure an embargo does not of itself make it one; it cannot alter the nature of the act itself, though it must be confessed the language as well as substance of some of those orders is violent enough. To see what the legal consequences of those acts are, it may be proper to look back to the orders, or at least to some of them. The first order, which is dated *November* 5th, 1800, perhaps may not be construed an act of hostility; for by that order, after stating the uncertainty whether the agreement respecting *Malta*, entered into on the 30th of *December* 1798, would be fulfilled, it is only ordered that an embargo should be laid on all *English* vessels in the ports of the empire till the convention should be fulfilled; however, immediately on that order being made guards were placed along the shore, not to prevent the ships from sailing, but to prevent the crews from escaping, and those guards continued on that duty till the 10th of *November*. It is not necessary on the present occasion to say that this order of the 5th of *November* amounted to an act of hostility, notwithstanding the intention of it was to prevent the escape of the crews: because the order of the 10th of *November* speaks a language perhaps more decisive. On the 10th of *November* the *British* sailors were all taken out by *Russian* guards, and

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1803.

BEALE v. THOMPSON.

marched into the interior of the country, and the foreign seamen serving on board the *British* ships were put on shore and set at liberty. Now I cannot well conceive an act more hostile than that, or an act more unnecessary for the mere purpose of detention. The crews were totally deprived of their liberty, marched up into the country, and removed from the exercise of any duty that belonged to them in their respective ships. And there seemed to be a marked distinction between the *British* seamen and the seamen who were the subjects of other Powers with whom *Russia* had no quarrel. Now if the object was merely to detain the ships, what reason was there to make that distinction? They were all equally bound, by their duty arising from their contract with the ship-owners, to take care of and to protect the ship. But these foreigners were claimed by their respective consuls. Why were they claimed by their respective consuls? Because they looked on that imprisonment of the subjects of their states as an act of hostility, and it was not the intention of the *Russian* Government to commit an act of hostility towards them; and therefore they were set entirely at liberty. Then came the proclamations of the 18th and 21st of *November*; and though the immediate object of the first part of those proclamations was not the ships now in question, but two other ships, yet the subsequent part of it seems pretty strongly to shew the hostile views of the Court of *Russia*. It states that two *English* ships at *Narva* had made resistance, fired pistols, and forced a *Russian* sailor into the water, and afterwards weighed anchor and sailed away. This might have justified strong measures, perhaps, against these two ships. But although these two ships had dropped anchor and made their escape, the revenge of the *Russian* Government was directed against the owners of other ships that remained in that port, and these ships are ordered not to be detained, but to be burned. The subsequent part of the proclamation states that the embargo is not to be taken off from the *English* vessels; it calls it an embargo, but it is manifest that the language in the proclamation is merely colourable, probably with a view that their conduct might not appear to other Powers so violent as in fact it was; they called it an embargo which was not to be taken off the vessels, not saying one word of the treatment of the crews at the time that proclamation had been issued. The treatment of the crews continued after that period exactly the same that it was before. I am not aware that any

1803. BEALE v. THOMPSON.

material observation arises on the orders of Council that issued in this country in consequence of the detention of *British* vessels in the *Russian* ports; they order *Russian* vessels to be detained, and they amount simply to an embargo. In a subsequent order of Council, an endeavour is made to prevent the acceptance and payment of any bills in favour of any persons residing in the Emperor's dominions. These are all the observations that arise on the language of the orders. The language of some of them is, I think, hostile enough: but it is what the *Russian* Government has done, and not what it has said, that will denominate the transaction by its true description. It is material to consider what is the difference in fact between that which has usually been considered as an embargo and that sort of conduct pursued by the *Russians* on this occasion. It is admitted that a mere embargo, a mere detention, will not prevent the claim of the mariners to a continuance of the payment of their wages, and for the best of all possible reasons; in an ordinary embargo, the masters and mariners remain in possession of the ship and cargo, and while they are in possession of the property they are in a situation to discharge that duty which the law casts upon them, namely, to take care of the ship and cargo while she is detained in port. The mischief to the owners would be extreme if such an embargo were to effect a dissolution of the contract; in most cases, the property would be lost if there were not proper agents to take care of it, and the mariners would lose all their wages. But what duty remained to be done by these *British* seamen when the ships had been taken from them, when the cargoes had been taken away, and when they themselves had been sent into the interior of the country at a great distance from the place where their duty was to be exercised? Surely the case is extremely different; there was no duty to be performed, no relation of master and servant subsisting; both he who was the master, and they who were the servants, were become the servants and the slaves, for ought I know, of others, for perhaps they were in a state of servitude and captivity; and what was to be the end of their detention they did not know. As they had no care attached to their situation, and no duty, there was no foundation for the earning of wages during that period. It is said it was their duty to stay and to wait the event, and to take care of the property for the benefit of their employers. I should wish to hear some authority for that proposi-

tion.

tion. I agree it is their duty to ſtay while a common embargo only is laid on the property. But in this caſe what reaſon was there to make it incumbent on them to ſtay? Suppoſe a mariner in cloſe confinement ſhould have found the means of eſcaping, and ſhould, have come to *England*, would he have acted in contravention of his articles by ſo conducting himſelf? or could it be contended that, if the ſhip was afterwards ſet at liberty and performed the contract with the freighters ſo that ſhe earned freight, the mariner who made his eſcape under ſuch circumſtances would not be entitled to wages *pro ratâ itineris?* It ſeems to me in reaſon and in juſtice that it cannot be ſo intended: for the ſailors never meant to enter into a contract to ſtay in priſon if the ſhip ſhould be laid under an hoſtile capture. With reſpect to the caſes cited, the novelty of this caſe prevents, I think, any great uſe being made of them; hardly any one of them applies: and as to the foreign juriſts, they are too looſe and too vague to be made uſe of either on the one ſide or on the other. For the Plaintiff, the two caſes moſt ſtrongly relied upon in argument were thoſe of *Chandler* v. *Greaves*, and *Paradine* v. *Jane*; neither of which caſes, in my mind, apply at all to the caſe before the Court in favour of the Plaintiff. The firſt of theſe caſes, which is to be found in 2 *H. Bl.* 606. note *a*, was an action for wages, brought by a mariner who in the courſe of his duty had received a blow from a piece of timber falling on him, in conſequence of which, when the ſhip arrived at *Philadelphia*, the maſter put him on ſhore and paid him wages up to that time. In every contract of ſervice, the contract goes on though the ſervant be diſabled by ſickneſs. A ſervant is never conceived to enter into an engagement that he will continue in health; it is no part of the contract that he will continue ſo, indeed ſo far from it that the maſter is in general obliged to maintain his ſervant in ſickneſs as well as in health. In *Chandler* v. *Greaves*, the conduct of the maſter of the ſhip was totally unjuſtifiable; he ought to have kept the ſeaman and brought him back to the place where he firſt took him on board; he ought to have brought him home. The Court held, that the mariner was entitled to wages during the whole voyage, the ſhip having earned her freight. With reſpect to the caſe of *Paradine* v. *Jane*, which is reported in *All.* 27., that caſe does not apply at all; it was under circumſtances extremely different from that now before the

Court,

1803.

BEALE v. THOMPSON.

Court, and the principle is not the same. That was an action brought on an express covenant made by a tenant to repair, and the Court took a rational distinction, that where an obligation is imposed by rule of law, and there is no express covenant, the law introduces a reasonable exception, *viz.* that an act of irresistible violence will excuse the party. But if a party enter into an absolute contract, without any qualification or exception, and receives from the party with whom he contracts the consideration for such engagement, he must abide by the contract, and either do the act or pay damages, his liability arising from his own direct and positive undertaking. But how does that apply to a case like the present? Here is no positive independent covenant. Mutual obligations are introduced by the articles, and the performance by one of the parties is the condition on which performance is to be required of the other. In the articles themselves, and in the declaration, the service on board is the consideration upon which the payments are to be made. I do not mean to insinuate that a man cannot be earning wages notwithstanding these words in the declaration, though he happen to be out of the ship; for if it be by the licence of the officers it is the same thing as if he were on board. This contract, this duty, only require that he should be in the service of the ship; and he may render as essential service to the ship on shore, at certain periods, as if he were on board; but still the service he is to perform is the ground on which the owners contract to pay him wages, and therefore it seems to me that these cases do not apply to the case before the Court. For the Defendant two cases have been cited, *viz.* the case of *Curling* v. *Long*, and of *Chandler* v. *Meade*; perhaps neither of these cases can be considered as a very strong authority; the last is only a *Nisi Prius* decision; and the expression of Lord Chief Justice *Eyre*, in the case of *Curling* v. *Long*, which was decided in this court, was certainly an *obiter dictum*; for it was not necessary to the decision of that case to say that the capture of a vessel, though afterwards recaptured, puts an end to the contract for wages, and that although the mariners were entitled to something, yet it was on a new contract, and not on the original contract. In the case of *Wiggins* v. *Ingleton*, *Ld. Raym.* 1211. Lord *Holt* ruled that an impressed seaman should have his proportion of wages for the time he served in the ship: now why had he a proportion only? because there was an end of his service; it was not his own fault that he was pressed; it was an

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act of the state. The ship earned her whole freight; the owners lost nothing of her freight; and yet it seems to be Lord *Holt*'s opinion on that occasion that he was only entitled to wages during the time he was on board. The other case cited was *Chandler* v. *Meade*: there the Plaintiff was hired at monthly wages, and served two months on board the ship, which was afterwards captured, and ransomed; the Plaintiff was impressed off *Plymouth*, and the ship arrived and delivered her cargo. Lord *Holt* held that no wages were due, the ship being taken and ransomed. The counsel on the other side alleged that there was a custom of merchants which entitled the seamen to recover *pro ratâ itineris*, but he failed in the proof of that custom, and therefore the Plaintiff was nonsuited: that case is decisive as to Lord *Holt*'s opinion upon the effect of the capture. He seems to think it a complete dissolution of the contract, and it has not been contended by the Plaintiffs that capture is not a dissolution of the contract. I have declared my opinion on the reason of the thing. As no service is capable of being performed, the mariners are entitled to no wages; but the hardship of the case is pressed very much on the Court. Now I do not feel any circumstance of hardship; if the ships had not been restored the hardship would have been much greater on the seamen; they would then have been imprisoned, and would have had no wages at all, whereas the vessels having been restored, and having earned freight, they are entitled to wages for that time they served, and that they have been paid. We must consider the grounds and reasons of the general rules of the marine law, which imposes this hardship not only on the crew but on the owners: for, from the nature of that sort of adventure, both those parties are certainly subject to great hardships and great risks. I think both the owners and the mariners in every contract of this kind are to be considered as adventurers, and both are bound to abide by the consequences of what may happen in the course of the voyage. This is the nature of the contract they enter into, each of them understands his situation, and every mariner knows under what circumstances he is liable to the forfeiture of wages. But I do not know whether this is for the disadvantage of the mariners. The great object of the law is to encourage commerce, and it is not for the advantage of mariners to throw all the risk and extensive consequences (which would be the case if we were to determine in favour of the Plaintiff) on the principal adventurers; in this case they are suffering as

1803.

BEALE v. THOMPSON.

well as the mariners, there being a detention of the vessel for six months, during which time she has been useless to the owners, who might have used her for other beneficial purposes. They have been losing the interest of the money on the capital they have employed in the adventure, and they have lost the profits and benefits they would have received but for this restraint. That is the hardship on their part. On the other hand, the mariners have lost nothing except their time for six or seven months, and they have endured their imprisonment; which is a circumstance of hardship incident to their situation. But if it were to be contended that in all such cases as this the owners should be obliged to maintain them, and to pay them wages for any length of time in the case of a hostile capture against the subjects and property of this country, I do not know where the mischief would end, and it would be a very great discouragement to mercantile adventure. But without reflecting on the hardships of this case, putting it on the ground of capture, I think the owners are not liable to wages, and I think the seamen must be understood to have contracted to endure the hardships of such capture. I am of opinion, therefore, that there ought to be judgment for the Defendant.

ROOKE J. Since I have heard the argument in the case of *Leatham* v. *Terry* (a), I am more aware than I was before of the extent of the question now before the Court, *viz.* What construction our courts of law shall put upon the late detention of our ships by the *Russian* Government? I wished to have taken more time to consider the point: but it has been thought expedient that this Court should deliver a judgment during the present term, that the parties may not be delayed as to their writ of error. I freely own my mind is not at present so settled as to enable me to give a decided opinion: but I will shortly state the inclination of my judgment, and the grounds on which it is formed. I incline to think it should be considered as an embargo only; and that if it is not in the strictest sense an embargo, yet still it bears a nearer analogy to an embargo than to a capture. My reasons are these: first, The Emperor of *Russia* calls it an embargo; he commands that an embargo be laid; he resolves not to take off the embargo till the agreement respect-

(a) A question arising out of the *Russian* embargo between underwriters upon ship and underwriters upon freight, the former claiming the freight earned by the ship after her release by the *Russian* Government as an incident to the ship which had been abandoned to them during the embargo. No judgment was at this time pronounced by the Court.

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ing *Malta* is carried into execution, and in the subsequent proclamation he engages to make satisfaction to the *British* subjects who have suffered losses during the troubles which have interrupted (*altéré*) the good understanding between his empire and *Great Britain*, and that the effects (*mis en sequestre*) put under sequestration shall be restored. Now a sequestration does not import a change of property; but, on the contrary, that the property continues to be the right of the true owner, and is held as a trust by the sequestrator. Our own proclamation states that our vessels are detained in the ports of *Russia*, and lays an embargo on the *Russian* ships and effects, but directs that no violence be offered to the crews, nor any injury done to the effects. The language therefore of the *Russian* Court is embargo, the retaliation of our Court is called an embargo: both are detentions *quousque*; but in the one case the crews and the effects are treated with more rigour and violence than in the other. I cannot persuade myself that this difference of treatment will change the nature of the act itself, and turn that into an hostile capture which the *Russian* Government declares to be a temporary detention: nor do I think now, when the property is restored and satisfaction made, that I have a right in my judicial capacity to call this act of the *Russian* Government by any other name, or to consider it in any other light than that in which it seems to have been considered both by the *Russian* Government and our own. The principal grounds of argument on the other side have been, 1. that the crews were taken out of the ships, and treated as prisoners; 2. that while prisoners the relation of master and mariner ceased between the sailors and their captains; 3. that if they were entitled to wages, there is no saying to what extent of time the owners might be liable to pay them. First, I do not think that the treatment of the crew as prisoners, and marching them up the country, varies the nature of the detention: it is still an embargo, or detention *quousque*. Suppose, instead of taking all the sailors out, they had taken half out and confined them; would those men, so confined, have been entitled to their wages? I think they would: yet during their confinement they could have rendered no actual service to the owner. Secondly, as to the relation ceasing. It may be suspended as to all the purposes of actual service; but so it is in the case of common embargo. If twenty men are necessary to navigate the ship, two or three may be sufficient to take care of her in port, and the rest are as useless to the master and owners as if they were in prison. The master indeed may

1803.
Beale v. Thompson.

have a controul over them; but this is in many cases productive only of trouble to him; he would have less trouble with them if they were to be taken from him and confined, and restored to him when the embargo was taken off. Thirdly, As to the length of time during which the owners may continue liable to wages being uncertain, it is not more uncertain than in the case of a common embargo. They are liable till it is taken off; it will not be taken off sooner or later because of the imprisonment of the crew. The owners are not more injured by taking the crew out than if they had been suffered to remain on board: perhaps less so; because the ship's provisions are thereby saved. These are the reasons which incline me to think that this seizure ought not to be considered in a court of law as differing in its legal consequences from a common embargo. And I am the less disposed to differ it, because I am not prepared to say that there is any middle state between an embargo and a capture; and if this is not embargo, but is to be considered as capture, it may follow that all contracts respecting the ship are at an end, that the charter-parties are annulled, the freight lost, and of course the wages lost also, and though in some of the cases the freight has been actually received, and therefore some wages may be claimed, yet when that is not the case, if we put such a construction upon the acts of the *Russian* Government as the Defendant insists upon, those poor sailors, who have navigated the ships out and home, will be indebted to the generosity of the owners alone for their wages out, and be entitled only on a *quantum meruit* for a remuneration of their services in bringing the ship home. If this be in legal effect not different from a common embargo, then, as I understand, it necessarily follows that all the contracts continue, unless dissolved by consent of the parties. And in the present case, there having been no actual dissolution, the contract continued during the time of the detention, and the sailor is entitled to his wages. It has been argued, that by separating the crew from the master, he could not discharge them; I say he could not discharge them in the case of a common embargo without their consent, unless in case of misbehaviour. And as in the case of a common embargo it is not probable that he would consent to discharge his crew, though they might desire it, if he expected his vessel to be soon released, so in the case of such an embargo as this in question it is not probable that the sailors would consent to be discharged, if they were to remain in prison, and would be thereby disabled from earning wages elsewhere. These are the reasons

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which incline my mind to think the Plaintiff is entitled to recover: and they apply to the cases both of foreign and *British* seamen. But as I am not so satisfied with them as to have entirely settled my opinion, I shall so far defer to the authority of my two Brethren as not to divide the Court, and thereby stop any judgment; but shall consent that judgment be given for the Defendant.

HEATH J. These are two actions brought, the one by a *British* subject, the other by a foreigner, and their declarations severally state that in consideration that they served on board their respective ships, the Defendants severally agreed to pay them their stipulated wages by the month. There is an averment that the Plaintiffs served aboard their respective ships. The hiring of mariners for a voyage is an executory contract, the service must be performed before the wages become due. There are many things that will dispense with the actual service, such as sickness and any accidental infirmity that happens after the mariner has entered on his services; but then the mariner is usually in the ship, and the ship is earning freight, so that there is a fund out of which the wages may be paid. It has been decided that an embargo of a temporary nature does not interrupt the contract. The matter that comes to be discussed is, Whether this be an embargo or an act of hostility? For if this be an act of hostility it discharges the party to a marine contract from performance. An embargo is merely temporary, and has no feature of hostility, inasmuch as it may be, and in experience often is, laid on ships belonging to the subjects of the power which imposes it: and sometimes it is imposed by friendly powers to prevent intelligence from being given to their enemies with whom they are at war, or for other urgent occasions to be justified only on a principle of necessity and self-preservation. In all these cases the mariner is serving aboard his ship, and in the actual employ of the master. The latter has a controul over his crew, and in some sort over his cargo. For he may land his cargo and dismiss his mariners. Here was a complete interruption of the service, and consequently of the contract. The master and crew were separated from their respective vessels and cargoes. It is found that the crew were made prisoners. The notice of the Emperor of *Russia* declares that the embargo shall not be taken off until the agreement of the convention concluded in 1798 shall have been completely carried into execution. This is a general reprisal, and falls within the definition given by

1803.
Beale
v.
Thompson.

Vattel, b. 2. c. 18. *s.* 342, 3. For he says, If there be any matter in dispute between two nations, and one call upon the other to come to a fair discussion of the matter, and the state so called upon refuse, the other state may issue general reprisals. Every general reprisal is an hostile aggression. The *English* vessels detained at *Narva* were burnt. This was an act beyond reprisals, for the making of reprisals is merely to coerce the party against whom it is taken to do justice. Every taking by virtue of a general reprisal is a sequestration and detention *quousque*. We are at present in the same situation with regard to *France*. Our present reprisals against that country, though founded, I hope, in better reason and more consonant to justice, proceed upon the same principle. It has been urged on behalf of the Plaintiff that the seizure of the ships will not make a war, unless other hostilities follow, and the event must decide the question.' To this it may be answered, that hostilities accompanied and followed the seizure. The battle of *Copenhagen* and the forcing of the *Sound* were hostilities; and it is found in the special verdict that the *Danes* were the allies of *Russia*. Suppose open war had followed between *Great Britain* and *Russia*, and then the Emperor *Paul* had died, and the ships had been restored within the same compass of time as at present; according to the argument the Plaintiffs could not have recovered. I cannot see how the difference arises. All hostilities between the two nations subsequent to the first seizure would have been extrinsic to the contract and the performance of it. From hence it appears that no service was either actually or virtually performed by the crews of these vessels during their imprisonment. There is a point of view which in my apprehension will set this matter in a clear light: The contract between owner and mariner being reciprocal, an action will lie for the owner against the mariner for not performing his part of the contract and serving him aboard his ship. Suppose that in the present instance the Defendant had sued the Plaintiff, and had alleged a breach of the contract in absenting himself from the ship during his confinement. It must be admitted that his involuntary absence, occasioned by the violence of the *Russian* Government, would afford a clear defence to the mariner, and would be a dispensation for the non-performance of his contract. The owner then has as good a defence against the claim of the the mariner for not serving him, as the mariner has against the

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owner for wages. In either case the law absolves the owner and mariner from the full performance of the contract, which is suspended by an hostile aggression, the duration of which in point of time is indefinite and uncertain. Considering this restraint as an interruption of the contract, the rule which must govern this case is clear and intelligible; the wages must be regulated by the actual service. Great would be the inconvenience if the contract should be holden to have continuance. It might endure for such a length of time as to prove ruinous to the owner of the ship. If the freight of the ship were to be paid by the month the like construction of the contract must take place in regard to the freighters, and must be equally ruinous to them. Such a decision would be contrary to the grand principle of the marine law, which protects the owners by making the right of the mariner to his wages commensurate to the right of the owner to his freight: for so I understand the maxim that freight is the mother of wages. In the present case the freight is payable by the ton, and the wages by the month. Supposing that the freight had been made payable by the month, the same question would arise concerning freight as is now made concerning wages. We have been much pressed with the case of *Hadley* v. *Clark*, 8 *T. R.* 259. That was the case of an embargo laid by the Government of this country. Liberty was given by the King's proclamation, dated in the next month after the embargo, to reland the goods, and neither the freighters nor the owners of the ships, for two years and upwards, chose to avail themselves of this licence. The maxim cited out of *Aleyn* by Mr. Justice *Lawrence* does not apply to marine contracts, the performance of which is excused by the act of the King's enemies. Arguments have been drawn from cases where mariners have been disabled by sickness or accident from performing their contract. In all those cases the freight has been earned which furnished a fund for the payment of wages. In *Chandler* v. *Grieves*, the seaman only recovered his wages to *Philadelphia pro ratâ itineris*. In the case of the mariner's dying in the course of the voyage, it should seem that he is entitled to a proportionate part of his wages, unless he be excluded by the specific terms of his contract. So in the event of a capture and recapture, as in the case of *Luke* v. *Lyde*, as was the freight so must the wages have been apportioned. I perceive no difficulty in considering this contract as suspended by an act of hostility. It is analagous to the

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1803.
BEALE
v.
THOMPSON.

case of a capture and recapture. It is immaterial whether the contract be interrupted in the middle or determined towards the end of the voyage. It is consonant to every principle of equity and commutative justice that the act of the King's enemies, inasmuch as it is a common calamity, should fall equally on the freighter and the owner of the vessel in regard to the contract between them, and on the owner of the vessel and the mariner as between them. If the owner of the vessel were to receive his whole freight, when the vessel is hired by the month, or the mariner his whole wages, they would be exempt from bearing their respective shares of an inevitable calamity which is common to all. In all other common calamities, as in the case of wreck or recapture, the owner receives freight *pro ratâ itineris* in the one case, or in the latter event contributes to the salvage; the wages, as the freight, must abate proportionably; and on principle I cannot see how these different calamities are distinguishable from each other. We need not be under any alarm lest the owners of the goods in this case should refuse to pay the freight. For the cargo is valuable, and if they refuse to pay the freight they must abandon the cargo. The effect of the hostility is merely to dissolve the contract, if it cannot be executed, or to suspend it, if by subsequent events it can be carried into execution to the good liking of both parties. For these reasons I am of opinion that the Plaintiffs ought not to recover their wages for the time that they were prisoners, and did not serve aboard their respective ships.

Lord ALVANLEY Ch. J. This is an action for mariners' wages brought against the owner on a contract entered into between him and the mariners, by which they hired themselves for a voyage at monthly wages, to be paid according to the laws of *Great Britain*, and in consequence of such a general hiring for the voyage covenanted that they would do their duty and obey the lawful commands of the officers on board the said ship. I cannot think that the words "on board" used in the declaration can operate to prevent them from recovering, as they might have done if the declaration had been more generally framed. They might have alleged that they did the duty as mariners during the said voyage. For that purpose they were hired; and therefore, in point of law, it will not make any difference though the parties were not actually on board all the time. I cannot but recollect that there was another con-

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tract entered into at the same time between the owners and merchants. Unfortunately in the present case the owners thought fit to enter into a different agreement with respect to freight, and the rate by which that was to be ascertained. We have therefore only an allegation in the special verdict that the ship was freighted on a voyage from *London* to *Petersburgh* and back again, and that the freight was to be paid, not by the month, but by the ton, provided the ship performed and consummated that voyage. If, instead of the parol agreement entered into between the merchant and the owner in this case, a charter-party had been executed, I believe there would have been found in that charter-party a particular proviso with a view to the very case that has happened, namely, the restraint and detainment of princes. In general there is a particular stipulation provided for that event; which shews it is an event which may be in contemplation, and frequently is in contemplation of the parties. The contract between the owners and the sailors is a general one; and with respect to this particular risk, all vessels are known to be exposed to it that sail on foreign voyages. It is a general contract that they will serve during that voyage; and therefore, as it appears to me, the only question on this occasion is, Did the voyage subsist, or did it not? If the voyage was in subsistence, I am of opinion that the Plaintiffs continued to earn wages as sailors during the whole time. Whatever their situation might be, whether they were under the pressure of a superior force acting upon them contrary to the law of nations or not could make no difference. If the voyage subsisted they are entitled to receive wages, unless they have by their misconduct forfeited that right, or unless they have entered into stipulations to the contrary. As it is observed in *Hadley* v. *Clarke*, the contract must speak for itself, and where there is an express and positive engagement to do any thing, and circumstance not within the power of either of the parties occurs, that circumstance cannot be alleged as an excuse for not fulfilling the contract. The contract here being, that the Plaintiff shall serve on board during a voyage from *London* to *Petersburgh* and back, it is one voyage. The law of *England* has (not I believe by positive statutes, but by constant usage) imposed this burden on the sailors, that if the ship shall by any accident be prevented from finishing her voyage they shall lose all their wages, unless they have made some stipulation to the contrary, or con-

1803.

BEALE v. THOMPSON.

1803. BLAKE v. THOMPSON.

tracted to serve in distinct voyages, or unless the owners have received some benefit in the nature of freight upon a distinct voyage. Now surely this entitles the sailors to a very liberal construction of this contract with respect to themselves: for if the owner be not able to perform his contract with the merchant, whereby he loses his reward, they must likewise lose every benefit which might result to them. I cannot admit that the nature of the contract between the merchant and the owners can have any effect on the contract between the sailors and the owners, nor are the sailors, when they demand their wages, to be told that in consequence of the peculiar nature of the contract for freight the owners gain no greater freight than if the detention had not taken place. I agree with my Brother *Heath*, that the case must be considered in the same light as if the freight, instead of being at so much *per* ton had been at so much *per* month; and then I admit, that in case of capture or otherwise the same arguments would in a great measure have arisen as between the owner and the merchant, as between the owner and the mariners. I have very little doubt, though my Brothers seem to doubt, upon this point, that the owners would have been entitled to freight at so much *per* month during the whole time, unless the merchant had stipulated to the contrary. Let us now inquire what effect these acts of the *Russian* Government had, whether they put an end to the voyage or divided it into two parts? On these articles the contract must be considered as entire; and as long as that contract subsists there can be no such thing as an interruption; it is either entirely at an end or entirely subsists. I admit that capture puts an end to the contract: but I do not admit, nor do the cases establish that capture one day and recapture the next will put an end to the contract; and, with great deference to that *dictum* of Lord Chief Justice *Eyre* in the case of *Curling* v. *Long*, I think that capture and recapture do not put an end to the voyage. Capture followed by a total loss does; but capture followed by recapture does not, and God forbid it should; for when a ship is taken *infra præsidia hostis* and becomes the prize of the enemy, if capture puts an end to the voyage the sailors are not interested to retake the vessel, for although the crew should rise on the enemy and recapture and bring back the ship, they are to be told she has been captured, which puts an end to their contract for wages. It has indeed been contended that the mariners in this case were guilty of

 a breach

a breach of duty in submitting to a superior force, and thereby lost their wages. By the law if the owner has lost his ship, the mariners will lose their wages: but this is not on the ground that the mariners have submitted to a superior force, but because the owner, having lost his ship, the freight and all the fruits of the voyage a e lost, and therefore the sailors shall not be entitled to wages. Suppose the ship is out of the custody of the master and crew for one day, and is recaptured the next, and the owner receives all the fruits of the voyage in the same manner as if she had not been taken, is the contract for sailors' wages to be at an end? I cannot subscribe to the doctrine that any transitory act of positive hostility is to supersede the contract. I apprehend that the contrary has been frequently determined. I believe that embargoes have often been laid on in foreign ports, not merely on vessels by way of caution, as was done in the case of *Hadley* v. *Clarke*, but by way of security against a supposed aggression; and am I to be told that such acts put an end to the contracts for wages, though the embargo be taken off the next moment? Suppose the *Russians*, hearing that we had committed an act of aggression against them, resolved to detain our ships in their ports, and that the fact of our having done so should turn out to be unfounded, and in a week's time news should arrive that the vessels were restored. It is not contended that if the crew had remained on board the detention could have amounted to a capture. There is an end, therefore, of the argument founded on the *quo animo*. The embargo cannot amount to a capture unless it be accompanied by acts different from those which attend a common embargo. If then an embargo, though not laid on merely for the sake of security, but by way of retaliation, when not accompanied with circumstances of extraordinary rigour, or carried beyond the usage of the law, would not put an end to the contract, we are to consider whether the circumstances which occurred in this case, of the master and mariners being taken out of the ship, of the ship itself being taken into the possession of the *Russians*, and the crews sent up into the country and treated with rigour, will make any difference. I wish the law of *England* had provided for those cases in which parties may abandon, and had declared when it should be competent to the owner or sailors to pronounce the contract at an end. But unfortunately the same rules have not been adopted in this country which prevail in some foreign countries with respect to right of abandonment,

1803.
BEALE
v.
THOMSON.

ment, if the embargo lasts beyond a certain time. I hope, however, that such will in future be provided against by the charter-parties and articles which the merchants of *Great Britain* subscribe. Suppose this embargo not to have been laid on professedly with a view to appropriate the captured vessels to the *Russian* Government, but by way of detention until satisfaction should be obtained from the *British* Court, and that it had been followed up with such a degree of rigour and for such a length of time that it would have been impossible to say that the sailors were bound to continue with the ship; still, I say, that in the present case the parties have agreed that the embargo should not have the effect of dissolving the contract. For it is to be remembered that the mariners were not permitted to remain on board earning their wages, but were removed up the country. Did they then come back on any fresh contract? Was there any intimation to them that there was an end of the voyage? No such thing appears. Now I say if either of these parties had a right to put an end to the contract, yet neither of them exercised that right. The captain considered the mariners as his crew, and they him as their master, and offered to do any thing they could for the benefit of the owners in that distant part of the world, by completing the voyage and bringing the ship home. Had they refused so to do, the owners would perhaps have procured another crew. Abandonment does necessarily put an end to the contract between the owner and the sailors. The insured, indeed, had a right to say to the underwriter that there was a total loss, for the assured are secured by the policy as well against detention of princes as against capture. The right to abandon, therefore, does not necessarily include a total loss. Had the *Russian* Government made the ship prize the mariners would have lost their wages; and on the other hand, if the voyage subsisted, subject only to a temporary detention of the ship, the sailors are entitled to their wages. The cases of *Hadley* v. *Clarke*, and *Blight* v. *Page*, which I think almost decide this case, establish that where a ship-owner contracts that his ship shall go to a certain place and bring back a certain cargo for so much *per* ton, and the merchant contracts to furnish him with that cargo, although by the act of an hostile state the merchant is prevented from furnishing the cargo, the owner is nevertheless entitled to his whole freight. Now how does that differ in principle from the present case? Suppose a fleet of ships, instead of being stopped by the act of the *Russian* Govern-

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1803. BLAKE v. THOMPSON.

ment, had been stopped by the act of God. Suppose, in consequence of stormy and tempestuous weather, they are obliged to winter in foreign parts, and the crews are under the necessity of abandoning their vessel in cold climates, if there be no stipulation to the contrary the owner will have his freight notwithstanding. Unless, therefore, the nature of the act of the *Russian* Government completely alters its effect in point of law, there being no difference with regard to inconvenience, the case must be governed by the principle laid down in *Paradine* v. *Jane*. The parties know what they are about; they contract, the one for the voyage and the other to carry the cargo at so much *per* ton. The sailors have gone the voyage to *Petersburgh* and they have come back. In their contract they said, we will be paid so much *per* month. It appears to me, therefore, in the first place, that an embargo does not necessarily put an end to the contract, though I do not say that there may not be cases where it may amount to a total loss. But I cannot think that it is absolutely necessary to consider this detention as a capture. It was a detention which might possibly be intended to be a capture in a certain event, and if that event had taken place it would have been a capture. In considering this case I lay great stress on the conduct of the parties. Possibly the Defendant was absolved from his contract with the sailors, and if he had thought fit, by the language of the articles, he might have hired other sailors. But he has not done so. Both the captain and the sailors have elected by their conduct to consider themselves as acting under that contract. However the Emperor of *Russia* might think proper to separate the crew from the ship and take the command from their master, the sailors boldly and faithfully did their duty to their commander, and did not avail themselves of the opportunity of deserting the ship, which if they had done I will not say what the consequences might have been, for a seaman is not bound to submit to all sorts of hardships. In this case every man on board did his duty, in consequence of which the ship was brought safe to the port of delivery and earned her freight. In *Blight* v. *Page* it was strongly urged that as the ship was absolutely prevented from going into a foreign port, where she was to be furnished with a cargo, both parties ought to bear the loss equally. But the Court said that as the merchant had stipulated to furnish a cargo he was bound to perform his contract. Embargo is a common incident in all voyages when *Great Britain* is at war with

1803. BEALE v. THOMPSON.

other countries. However this incident may be considered in the charter-party it certainly has been kept out of sight in the contract with the mariners. Now why did not the ship-owner stipulate with the mariners that in case of detention they should not continue to earn their wages. It was perfectly competent to them so to do, and I trust that in future they will do so: for on the true principle of *Hadley* v. *Clarke* and *Blight* v. *Page*, with which cases I am not disposed to quarrel, if the party do not provide against that which is a common risk, but makes a general contract, he must suffer for his neglect. The only questions in this case are, Did this voyage subsist? and has the sailor a right to recover his monthly wages for all the time which he served during that voyage? I am of opinion that he has not forfeited his wages by any act of his own; that the voyage subsisted, that during the continuance of the voyage his wages were going on, and that he has a right to recover them.

Judgment for the Defendant.

May 23d.

The Master, Wardens, and Commonalty of the BUTCHERS' COMPANY *v.* BULLOCK.

A penalty of 20*s.* having been imposed by one of the by-laws of the Butchers' Company on all persons selling meat on a *Sunday* within their jurisdiction, it was declared by a subsequent clause that if any offender should deny, refuse, or neglect to pay the penalty he should be liable to an action of debt. Held that it was not necessary to prove a previous demand in order to maintain such action, although averred in the declaration.

DEBT on a by-law. The declaration recited a charter incorporating the society of the art or mystery of butchers within the city of *London*, the liberties and suburbs thereof, and within any other place or places whatsoever within the space of two miles from the said city of *London* by the name of 'The Master, Wardens, and Commonalty of the Art or Mystery of Butchers of the City of *London*,' and that power was granted to them from time to time to make such reasonable ordinances, &c. as to them or the major part of them, of whom the said master and two wardens to be three, should seem good, also to impose such penalties and punishment by imprisonment or fine as should be sufficient to maintain such ordinances, &c. It then stated a by-law made as follows: That whereas the *Lord's-day*, commonly called *Sunday*, was by Christians to be kept holy, it was therefore ordained that no person then using or exercising or who thereafter should use or exercise the art or mystery of a butcher, and did or should inhabit or dwell within the said city of *London*, the liberties or suburbs thereof, or within two miles of the same city, should keep open any shop or

offer

offer or put to sale or sell any flesh upon the said day, and that any person who should offend contrary to any part of that ordinance should forfeit and pay to the said master, wardens, and commonalty, for the first time 20*s.*, for the second time 40*s.*, and for every time after 3*l.*; and that the sums of money forfeited should be to the use of the master, wardens, and commonalty, and the action should be brought in their name; and also that if any member of the said company within the city of *London*, the liberties or suburbs thereof, or within any other place within the said space of two miles from the said city of *London*, did or should thereafter infringe, break, or not duly observe any act, order, or ordinance in those orders or ordinances expressed or contained, and should thereby incur any penalty, fine, or forfeiture in the said order or ordinances contained, and should or would *deny, refuse, or neglect* to pay such sum or sums of money as should happen at any time thereafter by him or them to be forfeited or due to the said master, wardens, and commonalty for any pain, penalty, or forfeiture or breach of any of the said acts, orders, or ordinances, it should be lawful for the said master and wardens to recover such penalties, &c. by action of debt in any of his Majesty's courts of record at *Westminster*. It then stated a confirmation of the by-laws and notice to the Defendant; and proceeded to allege a breach of the by-law by the Defendant in exposing to sale meat on a *Sunday*, "whereby the Defendant forfeited to the Plaintiffs for his said offence the sum of 20*s.*, and which said sum of 20*s.* he the said Defendant afterwards, to wit, on, &c. was duly requested by the said Plaintiffs to pay to them, to wit, at, &c. but the Defendant then and there wholly refused and neglected to pay the same. By reason whereof an action accrued," &c. The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Hilary* term, when a verdict was found for the Plaintiffs, with liberty to the Defendant to move that a nonsuit might be entered.

1803.

The Master, &c. of the BUTCHERS' COMPANY v. BULLOCK.

Accordingly *Bayley* Serjt. on a former day obtained a rule *nisi* for entering a nonsuit or setting aside the verdict and granting a new trial. He moved on two grounds; first, that the by-law upon the face of it was bad, since it professed to regulate the trade of Butchers out of the limits to which the charter extended; for the words of the by-law were, "that no person exercising the trade and inhabiting within the said city, &c. should keep open shop on a *Sunday*," without adding within the said city, to which limits he contended

1803.

The Master, &c. of the Butchers' Company v. Bullock.

tended the by-law ought to have been confined in its terms. Secondly, That at the trial the Plaintiffs had failed in proving a demand of the sum forfeited, which by the terms of the by-law was made necessary, and was alleged in the declaration.

Shepherd and *Best* Serjts. shewed cause, but were stopped by the Court from arguing the first point, which they said might be brought on by motion in arrest of judgment. With respect to the second objection, they insisted that the demand alleged in the declaration did not amount to a special demand, but was nothing more than a *licet sæpius requisitus*, and therefore need not be proved, unless made necessary by the terms of the by-law; that the by-law created a duty in the party to pay immediately he committed the offence, and that as the offence was committed by his own act, and he could not be ignorant of the penalty which he thereby incurred, it was his business to pay without any formal demand on the part of the company. They referred to 1 *Roll. Abr. fo.* 468. *pl.* 6. where it is said, If *A.* is indicted in a leet for an encroachment in the highway, and afterwards *A.* dies and *B.* his heir continues the encroachment, and on this an order is made in the leet that *B.* shall reform the encroachment under a penalty of 40*s.*, and for not reforming thereof the lord of the leet brings an action of debt, he need not allege that *B.* had notice of the order made ; and *James* v. *Putney*, *Cro. Car.* 498. to the same effect. They observed that though it was true if any thing were to be done previous to the commencement of the action the declaration must allege it to have been done, yet in this case the words of the by-law were "shall deny, refuse, or neglect," the last of which words clearly did not import that any previous demand need be made; for though no such demand be made, yet if the party offending does not pay he neglects to pay; that if a demand was not rendered necessary by the terms of the by-law it was not required by the declaration, since the averment that the Defendant was duly requested might be referred to the service of the writ, and that even if the averment could not bear that construction it might be considered as impertinent, and therefore need not be proved.

Bayley Serjt. in support of the rule, admitted that where a by-law is silent respecting any demand, an action of debt may be maintained without a previous demand, but contended that the particular terms of the by-law in question had rendered such demand necessary: that although the word *neglect* alone might not

 have

have implied the neceſſity of a demand, yet being coupled with the the words *deny* and *refuſe* it muſt be taken to mean a neglect after demand; and if it could bear that ſignification the Court would be inclined to adopt it in a caſe where the penalty being extremely ſmall, the coſts of an action might exceed that penalty before the Defendant had an opportunity of putting a ſtop to it by paying the ſum forfeited; that ſuch probably was the reaſon why the words "deny, refuſe, or neglect" were introduced by the company into the by-law; he obſerved that this declaration was ſettled by the late Mr. Serjt. *Adair* and the preſent Lord Chief Juſtice of the King's Bench, who had deemed it neceſſary to introduce an averment of a requeſt, from which it may be inferred that they thought a requeſt eſſential, or at leaſt that it was a queſtionable point.

Cur. adv. vult.

There being a difference of opinion among the learned Judges they delivered their judgments this day *ſeriatim*.

CHAMBRE J. As the 1ſt objection taken in this caſe appears upon the record, it is not neceſſary for us to conſider it in this ſtage of the proceedings. The other objection is founded in a ſuppoſed defect of evidence at the trial, the Plaintiff having failed in proving a demand of the penalty. The declaration ſtates a particular requeſt, but if that be unneceſſary it is not contended, nor indeed can it be, that it is any thing more than ſurpluſage. It is urged, however, that though the expreſs words of the by-law may not perhaps have made a demand neceſſary, yet that ſo ſtrong an indication of intent that there ſhould be ſuch a previous demand is manifeſted in the diſpoſition of the words on which this queſtion ariſes as will induce the Court to hold ſuch demand neceſſary. One part of the by-law conſtitutes the offence and gives the penalty; another part declares how that penalty ſhall be recovered. I am not aware, however, that the diviſion of the clauſes affords any inference in ſupport of the Defendant's argument. The ſale of meat on *Sunday* is the offence; the penalty attaches on the commiſſion of that offence, and the whole corporation is authorized to ſue on denial, refuſal, or neglect of payment; on the laſt of theſe terms the whole queſtion turns. Before we deprive theſe words of their proper meaning we ought to be aſſured that they would be ambiguous or repugnant to ſomething elſe, unleſs a meaning were affixed to them different from the ordinary acceptation. *Quoties*

1803. The Master, &c. of the Butchers' Company *v.* Bullock.

nulla ambiguitas in verbis, nulla expositio contra verba expressa fienda est. There do not appear to be any three words in the English language more innocent of ambiguity than the words deny, refuse, or neglect. The word deny certainly implies a previous request, and so does the word refuse, though in some forms of pleading indeed the latter has not that signification, as where in a declaration it is alleged that the Defendant hath refused and still does refuse. In this case, however, I think it does imply a request, but the by-law goes further and adds, if the party offending *neglect*, which means nothing more than if he omit. It has been observed that the penalty consequent upon the offence being very small, if an action were commenced without a previous demand it might create unnecessary expence. That consideration, however, cannot induce us to alter the by-law. It is admitted indeed that if no such words had been introduced into the by-law, the Plaintiffs by the general operation of law would have been entitled to recover the penalty without any previous demand. It is true that the company might, if they pleased, restrain that right, but I do not find a single expression which evidences their intention so to do. It is said that the word neglect is qualified by the accompanying words; but is that so? The words are disjoined; the meaning is, if the offending person deny, or if he refuse, or even if he neglect to pay, he shall be liable to an action. The only objection to this construction is that the clause which directs in what manner the penalty shall be recovered is thereby rendered nugatory, since, according to this construction, the clause will have no other effect than would have resulted from the operation of law. But how does it appear that the corporation of butchers at the time when this by-law was made were acquainted with the rules of law, or even if they were that they meant to deviate from them? There could be no impropriety in stating for the instruction of their successors in what manner the action should be brought, though the directions introduced should amount to nothing more than the law would have authorized. It does not appear to me, therefore, to have been incumbent on the Plaintiffs to prove a previous demand.

Rooke J. The point on which I have the misfortune to differ in opinion from the rest of the Court is on the construction of one clause in the by-laws of the butchers' company. The company have brought an action of debt against the Defendant for a penalty of

of twenty ſhillings, for expoſing meat to ſale on a *Sunday:* they have ſtated in their declaration an actual demand or requeſt made to the Defendant to pay the penalty, and they have failed in proving it. The queſtion between us is, Whether this allegation is mere ſurpluſage, or whether the demand is not made ſubſtantially neceſſary by the terms of the by-law? I think an actual demand is neceſſary. The company are authorized by their charter to make by-laws for the regulation of the trade, not only among their own members, but alſo among all perſons who exerciſe the trade within the city of *London* or two miles thereof. The by-law in queſtion inflicts a penalty of twenty ſhillings, not on all who *ſell* meat on a *Sunday*, but on all who keep open ſhop or offer meat to ſale on a *Sunday;* and it has this clauſe, that if any one ſhall *deny*, *refuſe*, or *neglect* to pay the penalty the ſame ſhall be recovered by action of debt. Now as this by-law affects ſtrangers as well as members of the corporation, ſince it reſpects acts, which are not neceſſarily penal, but are open to explanation, and may be innocent or penal, according as they are explained, and as it inflicts a penalty of twenty ſhillings only, which is much leſs than the mere coſts of a writ, when I am called upon to ſay whether this clauſe, which declares under what circumſtances the action of debt ſhall be brought, has no meaning at all, and is mere ſurpluſage, or whether it has a meaning and is intended for the relief or ſecurity of thoſe who may be charged with offending againſt it, I own I cannot heſitate in delivering my opinion that it ſhould receive the milder interpretation. But if I thought the by-law ſo equivocal as to be fairly open to either interpretation, I ſtill ſhould lean to that expoſition which the company themſelves have put upon it by the form in which they have declared. The words of the clauſe in queſtion are, "if any one ſhall deny, refuſe, or neglect to pay." It is agreed on all ſides that if this clauſe had been omitted, the the offender would have been liable to an action of debt without any previous demand. The queſtion is, Whether theſe words mean only that he ſhall in all caſes be liable to an action, or whether only in caſes of denial or refuſal, or of neglect under particular circumſtances. A man cannot well deny or refuſe till he is charged with an act or requeſted to do it: both theſe words, therefore imply a previous demand. With reſpect to the word neglect, it does not exclude the notion of a prior requiſition, it is not neceſſa-

1803.
The Master, &c. of the Butchers' Company v. Bullock.

rily confined to an omission before demand, for a man may neglect to do a thing after he is requested to do it. It is in this respect equivocal. A man may neglect to do a thing after request, or he may neglect before. The word therefore being thus equivocal, I think with my Brother *Bayley* (to whom indeed I am indebted for almost every argument I can urge in support of my opinion) that it should receive its interpretation according to the company in which it is found, or in other words according to the context. "Deny or refuse" imply a prior notice: "neglect" may or may not require it according to the intention of those who made the clause: then I will give it that interpretation which will make all the words effective and consistent, and not that which will take away all meaning from the two former words, and render the whole clause nugatory. By giving this construction to the term "neglect" all the three words will have an effective meaning, for a man may neglect after demand, though he neither denies the fact nor refuses to pay; he may on receiving notice engage to send the money to the officer of the corporation or to pay it within a limited time, and by neglecting to pay it may incur the penalty: and perhaps the corporation had doubts whether under such circumstances he could be considered as denying or refusing to pay unless they made another demand. The framers of this by-law might have very good reasons for requiring a notice to be given before an action should be brought. The by-law binds themselves as well as all who sell meat on *Sunday* within their jurisdiction. Not every sale was to be penal; cases of necessity might afford an excuse; the persons charged might be able to explain the fact if notice was given them; or they might be ready to pay the penalty without incurring the further expence of costs of suit: and if the penalty was paid the corporation could gain nothing more by bringing an action, the suit at law could be beneficial only to the clerk or law officer of the company. This clause, therefore, may have been framed with the view of making a notice necessary, and to save offenders from being harassed with writs and costs of suit by the clerk of the company if they were ready to pay the penalty. It may be said, if this was their meaning why did they not expressly say so? I answer, they have said so, very plainly, though not expressly, if my interpretation be right: but if the other interpretation is the true one, they have really said nothing that is effectual.

effectual. The clause will then have this meaning; whether the person charged as an offender denies the fact or not, whether he refuses to pay or not, is immaterial, if he does not as soon as he has sold meat on a *Sunday* come immediately and pay his twenty shillings to the officer, he shall be considered as guilty of neglect, and shall be liable to an action of debt. I do not in my conscience believe that this was their meaning; the allegation of notice in their declaration warrants me in saying they do not so understand their their own by-law at this day; and I see no reason why I should join in forcing such an interpretation on them as may be productive of oppression, when the milder interpretation can be attended with no inconvenience worthy attention, for it is as easy to give a notice as to serve a writ; and the offenders are not in general persons who are likely to run away to avoid paying twenty shillings; they may as easily be found after notice as before. I think, therefore, in this case there should be a nonsuit entered.

HEATH J. This matter appears to me to lie in a very narrow compass. I can add but little to what has been said by my Brother *Chambre*. It seems to me that the corporation intended to enumerate every species of non-feasance, and having used the words deny and refuse, they superadded another word with a different signification. If the word "neglect" was intended to have no other meaning than the two proceeding words why was it added? When words are added to words, they are designed to extend the meaning of those first mentioned. The law is not very curious in respect of demands previous to the commencent of an action. If a bill of exchange be made payable on demand, bringing the action is considered as a sufficient demand. So in *Hope* v. *Colman*, 2 *Wils.* 221., to debt on an annuity the Defendant pleaded that it was payable only if personally demanded by the Plaintiff, and that the Plaintiff did not personally demand it; the Court were of opinion that the demand was not traversable in that action, though it might have been so if an action had been brought upon the covenant. It is true that they also observe upon the circumstance of the requisition that a demand should be made, being introduced in a parenthesis in the deed: which is indeed an absurd reason, and in some measure diminishes the authority of the report.

Lord ALVANLEY Ch. J. I am of the same opinion with my Brothers *Heath* and *Chambre*. I consider the words "if any person

1803. The Master, &c. of the Butchers' Company v. Bullock.

ſon ſhall deny, refuſe, or neglect," not as reſtraining the right to bring the action, but merely as deſcriptive of the parties againſt whom the action ſhall be brought in reſpect of the commiſſion of the offence. It is ſaid that great advantage would ariſe from notice being given to the offender; but I can diſcover no advantage which is not counterbalanced by an equal diſadvantage. Hardly any of the ſtatutes which inflict penalties require notice to be given to the parties. The penalty is inflicted by a by-law, of which the Defendant was bound to take notice. Why ſhould the corporation give notice to the offender of their intention to bring an action but to enable him to remove himſelf out of the way? There being no words in the by-law which require notice, I think that an action accrued without it. The word "neglect" muſt be altogether rejected unleſs we give this interpretation to the by-law. That word ſeems to have been inſerted for the purpoſe of making the party liable upon every non-performance, and would be perfectly uſeleſs unleſs that conſtruction were given to it. I think therefore the Plaintiffs ought not to be nonſuited.

Rule diſcharged.

Dann v. Spurrier (a).

The following certificate was ſent to the Lord Chancellor.

This caſe has been argued before us, and we are of opinion that upon the legal conſtruction of the ſaid agreement, the Defendant had not a right to determine the term of 21 years thereby agreed to be granted at the expiration of the firſt ſeven years.

Alvanley.
J. Heath.
G. Rooke.
A. Chambre.

(a) *Vid. ante*, p. 399.

END OF EASTER TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

AND

In the HOUSE of LORDS,

IN

Trinity Term,

In the Forty-third Year of the Reign of GEORGE III.

1803.

WYE *v.* FISHER.

June 13th.

A Plaintiff having tendered an issue to a plea, and demanded a rejoinder where the Defendant was under terms to rejoin *gratis*, the Court held the judgment regular, but set it aside without costs, because the Plaintiff might have added the *similiter* himself.

IN this case, the Defendant having pleaded the general issue *Non assumpsit*, a plea of bankruptcy, and a plea of set-off, the Plaintiff joined issue on the two first pleas, and tendered an issue on the third; he then demanded a rejoinder, though the Defendant was under terms to rejoin *gratis*, and consequently the Plaintiff was at liberty to have added the *similiter* to the third plea without demanding a rejoinder; the Defendant not having rejoined, the Plaintiff signed judgment for want of a rejoinder.

Clayton Serjt. now shewed cause against a rule *nisi* for setting aside the judgment and subsequent proceedings thereon, and admitted that of late years a rule had been introduced in favour of Plaintiffs, allowing them, in cases where the Defendant is under such terms as in the present case, to add the *similiter* without any demand of a rejoinder; but contended that, this being a rule in-

 troduced

1803.
Wye
v.
Fisher.

troduced for the benefit of the Plaintiff, he was still at liberty to wave it and demand a rejoinder, and, consequently, the Defendant not having complied with that demand, the Plaintiff was right in signing his judgment.

Shepherd Serjt. *contrà*, insisted that the judgment was irregular, being signed against the Defendant for not doing that which the Plaintiff might have done for him. He observed, that the Defendant was deceived by the conduct of the Plaintiff; for as he knew the Plaintiff might add the *similiter*, he stood still, expecting a notice of trial while the Plaintiff was signing judgment against him.

The Court were of opinion, that as the rule of adding the *similiter* was introduced for the benefit of Plaintiffs, they had a right *renunciare juri pro se introducto*; but as it was not necessary for the Plaintiff to have adopted this circuitous course, they set aside the judgment and subsequent proceedings thereon without costs.

June 16th.

GEORGE BIRCH Esquire *v.* The Bishop of LITCHFIELD and COVENTRY, CHARLES OAKES Esquire, and JOHN HUNT Clerk.

In *quare impedit* the Defendant pleaded that one *M. O.*, under whom he claimed, being seised in fee of one moiety of the advowson to present to one turn in every two turns, presented one *J. O.* in her proper turn; that the church, being afterwards vacant, one *J. W.*, under whom the Plaintiff claimed, presented in his proper turn; that the church being again vacant, the Plaintiff presented; and that the church being a fourth time vacant, it belonged to the Defendant to present. On demurrer to this plea, the Court held that the Defendant had not shewn a title to present, since he had not shewn whether the third presentation was by usurpation or by agreement, and that it could not be presumed that the Defendant was entitled to present in the first and fourth turn, and the Defendant in the second and third, since the plea averred that *M. O.* had presented to the first turn in her proper turn, and *J. W.* in his proper turn. *Semb.* that if it had appeared by the plea that the Plaintiff had presented to the third turn by usurpation, he would still have been entitled to the fourth turn by right.

QUARE IMPEDIT. The declaration stated that the Defendants were summoned to answer the Plaintiff in a plea that they permit him to present a fit person to the church of *Handsworth* in the county of *Stafford*, and in the diocese of the said bishop, which was void, &c. and also to a certain other church of *Handsworth*, &c. which was void, &c. The first count stated, that on the 28th of *June* 1776 the Plaintiff was seised of the advowson of the church first mentioned, as in gross by itself as of fee and right, and being so seised, and the church being vacant, presented one *Thomas Lane*, his clerk, who was instituted and inducted into the same, and that afterwards, *viz.* on the 1st of *October* 1802, the Plaintiff being so seised thereof, the church again became vacant by the death of the said *Thomas Lane*, and that it belonged to the

Plaintiff

1803.

BIRCH *v.* The Bishop of LITCHFIELD, &c. and Others.

Plaintiff to present a fit person to the said church, but the Defendant hindered him, &c.

The second count alleged that *John Wyrley* Esq. on the 9th of *July* 1767, at *Handsworth* in the county aforesaid, was seised as of fee and right of three fourth parts of the advowson of the church secondly above mentioned, as in gross by itself; that is to say, to present to the said church in three successive turns in every four turns, the whole into four turns to be divided. And being so seised to the same church, being vacant, presented as in his first turn one *John Birch*, his clerk, who, at the presentation of the said *John Wyrley*, was admitted, instituted, and inducted into the same in time of peace, in the time of his present Majesty. And the said *John Wyrley* being so seised as last aforesaid, and the last mentioned church being full of the said *John Birch*, the incumbent thereof, the said *John Wyrley* afterwards, to wit, on the 11th day of *January* in the year of our Lord 1772, at *Handsworth*, duly made and published his last will and testament in writing, and thereby devised, among other things, all his estate of and in the last mentioned advowson to *G. Birch* Esq. and his heirs; and afterwards, to wit, on the day and year last aforesaid, at *Handsworth* aforesaid, in the county aforesaid, died so seised as last aforesaid, and without revoking or altering his said will, by reason whereof the said *G. Birch*, on the death of the said *John Wyrley*, became and was seised as of fee and right of the said three-fourth parts of the advowson of the last mentioned church as in gross by itself; and the said *G. Birch*, being so seised as last aforesaid, the same church afterwards, to wit, on the 28th day of *June* in the year of our Lord 1776, at *Handsworth* aforesaid, became vacant by the death of the said *John Birch*; whereupon the said *G. Birch*, being so seised as last aforesaid to the same church, being so vacant as last aforesaid, presented, as in his second turn, *Thomas Lane*, his clerk, who, at the presentation of the said *G. Birch*, was admitted, instituted, and inducted into the same in time of peace, in the time of his present Majesty; and he the said *G. Birch* being so seised as last aforesaid, the same church afterwards, to wit, on the 1st day of *October* in the year of our Lord 1802, became and was vacant by the death of the said *Thomas Lane*, and yet is vacant; by reason whereof it belongs to the gift of him the said *G. Birch* to present, as in his third turn, a fit person to the same church;

1803.

BIRCH v. The Bishop of LITCHFIELD, &c. and Others.

and the said Bishop, *C. Oakes*, and *John Hunt*, do unjustly hinder, &c. to the damage, &c.

The Bishop pleaded that he neither had nor claimed any thing in the said rectories and parish churches, but the admission, institution, &c. as ordinary, &c.

The Defendant *Hunt* pleaded that he did not hinder the Plaintiffs from presenting, &c.

The Defendant *C. Oakes* pleaded two pleas, stating a deed of grant between the said *C. Oakes* and *John Wyrley*, but which was lost by time and accident, by which *C. Oakes* gave to *John Wyrley* the last presentation in exchange for the now right of presentation. On these pleas issues were joined. He then pleaded, thirdly, "That the said *George Birch* ought not to have or maintain his said action against him, because, protesting that the said *G. Birch* never was seised of the whole of the said advowson in the said first count of the said declaration mentioned, or of three-fourth parts of the said advowson in the second count of the said declaration mentioned, the said *C. Oakes* says, that the said church in the said first count of the said declaration mentioned, and the said church in the said second count of the said declaration mentioned, at the said times, when, &c. was and still is one and the same church, and not other or different. And that *Mary Oakes*, deceased, in her lifetime, to wit, on the 24th day of *November A. D.* 1731, was seised of and in one moiety of the advowson of the said church, *to present to the said church one turn in every two turns*, in gross by itself as of fee and right; and the said *Mary Oakes*, being so seised, she the said *Mary Oakes* afterwards, to wit, on the said 24th day of *November A. D.* 1731 aforesaid, presented to the said church, being then vacant, *in the proper turn* of the said *Mary Oakes*, one *John Oakes*, her clerk, who on that presentation was admitted, instituted, and inducted into the church aforesaid, in time of peace, in time of our late Sovereign Lord King *George* the Second, and became the incumbent thereof. And the said *John* being such incumbent, and the said *Mary* being so seised, afterwards, to wit, on the 7th day of *March* in the year of our Lord 1746, at *Handsworth* aforesaid, by a certain indenture then and there made between the said *Mary Oakes* of the one part, and the said *John Oakes* of the other part, (one part of which said indenture, sealed, &c. *profert*) she the said *Mary Oakes*, for the considerations therein mentioned, did give

and grant unto the said *John Oakes* and his heirs the aforesaid moiety of her the said *Mary Oakes*, of and in the said advowson, to have and to hold the same unto the said *John Oakes* and his heirs for ever, as by the said indenture more fully appears; by virtue of which said last mentioned indenture the said *John Oakes* became and was seised of and in the said moiety of the said advowson as of fee and right; and the said *John Oakes* being so seised thereof, afterwards to wit on the 8th day of *June*, *A. D.* 1767, at *Handsworth* aforesaid, by a certain indenture then and there made between the said *John Oakes* of the one part, and the said *Charles Oakes* of the other part (one part of which said last-mentioned indenture sealed &c. *profert*), the said *John Oakes* for the considerations therein mentioned, did give and grant to the said *C. Oakes* and his heirs the aforesaid moiety of and in the said advowson, to have and to hold the same unto the said *C. Oakes* and his heirs for ever; by virtue of which said last-mentioned indenture the said *C. Oakes* became and was seised of and in the aforesaid moiety of and in the said advowson, as of fee and right; and the said *C. Oakes* being so seised thereof, the said church afterwards, to wit, on the day and year last aforesaid, became vacant by the death of the said *John Oakes*; whereupon one *John Wyrley*, Esq. being then and there seised of and in the other moiety of the said advowson, in gross by itself as of fee and right, presented one *John Birch* to the said church being so vacant, *in the proper turn* of the said *John Wyrley*; and the said *John Birch* upon that presentation was admitted, instituted and inducted into the same church, and became incumbent thereof; and the said *John Birch* being such incumbent, and the said *John Wyrley* being so seised as aforesaid, he the said *John Wyrley* afterwards, to wit, on the 11th day of *January*, *A. D.* 1772, at *Handsworth* aforesaid, duly made and published his last will and testament in writing, executed and attested as by law is required for passing real estates, and thereby devised the said moiety of the said *John Wyrley*, of and in the said advowson to the said *G. Birch* and his heirs; and afterwards, to wit, on the day and year last aforesaid, at *Handsworth* aforesaid, died so seised as last aforesaid, without revoking or altering his said will; by virtue whereof the said *G. Birch* became and was seised of and in the said last-mentioned moiety of the said advowson, as of fee and right; and the said *C. Oakes* being so seised of the said first-mentioned

1803.

BIRCH v. The Bishop of LITCHFIELD, &c. and Others.

tioned moiety, of and in the said advowson as aforesaid, the said church afterwards, to wit, on the 28th day of *June, A. D.* 1776, became vacant by the death of the said *John Birch*; whereupon the said *George Birch* then and there presented to the said church, being so vacant, one *Thomas Lane*, his clerk, who upon that presentation was admitted, instituted, and inducted to the same, and became the incumbent thereof: And the said church afterwards, to wit, on the 1st day of *November, A. D.* 1802, became vacant by the death of the said *Thomas Lane*, whereby it then and there belonged, and still belongs to the said *C. Oakes* to present a fit person to the same church, and this the said *C. Oakes* is ready to verify; wherefore he prays judgment if the said *G. Birch* ought to have or maintain his aforesaid action against him, together with his damages according to the form of the statute, in such case made and provided, and a writ to the bishop.

To this third plea the Plaintiff demurred, and assigned for causes of demurrer, "that the same plea doth not disclose any title in the said *C. Oakes* to present a fit person to the church, in that plea mentioned at the present vacancy thereof. And for that it is not alleged, nor does it appear in or by that plea in what right or by what title the said *G. Birch* presented to the church therein mentioned, the said *Thomas Lane*; nor whether that presentation was made by virtue or in pursuance of any grant made in that behalf to the said *G. Birch*, or by usurpation or otherwise. And for that the same plea alleges the said churches, in the first and second counts of the said declaration mentioned, to be one and the same church, whereas it was not competent to the said *C. Oakes* to make that allegation; and for that the same plea being pleaded as and for a special plea, yet amounts to the general issue as to one of the counts of the said declaration: and for that the same plea does not conclude with a traverse, and is therefore argumentative: And for that the same plea is in divers other respects defective and informal." The Defendant *C. Oakes* joined in demurrer.

Williams Serjt. in support of the demurrer. The question arising upon this demurrer is, Whether, if the Plaintiff and the Defendant *Oakes* are each seised of a moiety of the advowson of the church, and each is to present to one turn in every two turns, and the Plaintiff has presented to the two last turns, he is not also entitled to present to this, which is the third turn? According to the statement of the right of

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presentation on the plea, the Defendant *Oakes* should have presented to the last turn, and the presentation of the Plaintiff to that turn which is stated to have taken place, must now be deemed to have been a presentation by usurpation. In *Bro. Abr. tit. Quare Impedit, pl.* 118, where an advowson descended to four co-parceners, and the two first presented in their turn, and then a stranger usurped upon the third, it was held that upon a fourth avoidance, the fourth daughter should not lose her turn on account of the usurpation suffered by the third daughter. It makes no difference that in this case the second turn was usurped by a person not a stranger to the church, for with respect to that turn he must be taken to be a stranger. The doctrine of the above case is recognised by *Willes*, Ch. J. in *Barker* v. *The Bishop of London*, *Willes*, 659. In *Bro. Abr. tit. Presentation, pl.* 26. this case occurs; *A.* and *B.* having a right to present to a vicarage by turns, *A.* whose turn it was, suffered the right of presentation to lapse to the Bishop, who collated a clerk, upon whose death *B.* presented, and it was held that he had a good right so to do; for that *A.* by letting the living lapse to the Bishop had lost his turn. Before the 7 *Ann. c.* 18. an usurpation not resisted would have been conclusive evidence of a right in *quare impedit*; and the party claiming a right of presentation would, upon the next avoidance, have been put to his writ of right. Had it not been therefore for the provisions of the statute of *Ann*, the Plaintiff might have claimed the whole advowson, having been allowed to usurp upon the Defendant in the last turn. Under that statute, however, upon any subsequent avoidance the parties are at liberty to litigate the question as if there had been no usurpation. Soon after the fire of *London*, a case arose which is applicable to the present; *viz. The Bishop of London* v. *The Mercers' Company*, 2 *Str.* 925. *Fitzg.* 247. There a *quare impedit* was brought by the Company for presentation to the parish church of *St. Mildred Poultry*, and *St. Mary Colehurst*, in the city of *London*; the declaration stated, that both churches were burned down by the fire, and the two parishes were united by act of parliament, with right reserved to the patrons to present by turns, and that which had the greatest endowment to present first; that *St. Mildred's Poultry*, had the greatest; that the Plaintiff had the advowson of *St. Mary Colehurst*, and the Crown of *St. Mildred*, whose church was full of *Richard Perinchief*, clerk; that after the union King *Charles* Second presented *Richard*

Perinchief,

1803.
BIRCH
v.
The Bishop of LITCHFIELD, &c. and Others.

Perinchief, D.D. who died, and the King presented *John Williams*, who was instituted and inducted, and afterwards promoted to the see of *Chichester*; that it then belonged to the King to present by his prorogative, and he accordingly presented *George Martin*; and upon his death King *George* the First presented *Robert Bretton*; and that upon his resignation the company claimed a right to present. The Court held that the Mercers' Company had a right to present, because the presentation by the Crown of *Williams* and *Martin* was but one presentation, and consequently the presentation claimed was the fourth presentation; though, if those had been considered as two presentations, the Company would not have been entitled to present, notwithstanding all the previous presentations by the Crown. In this case it matters not to the Plaintiff whether the Court shall deem the last presentation by him to have been by right or by wrong. If it was by wrong, the cases shew that he has not lost his right to the third turn, by his usurpation; and if it was by right it must have been by permission of the Defendant *Oakes*.

Bayley Serjt. *contrà*. The argument in support of the demurrer proceeds on the notion that the right of presentation claimed upon the pleadings is an alternate right of presentation, *viz.* once in every two turns; but that does not appear to be the right claimed. Nor indeed, if the right claimed were an alternate right, would the law be so clearly in the Plaintiff's favour as has been supposed. The case of a presentation by the Bishop in the turn of one of several co-parceners in consequence of a lapse, does not stand on the same ground as a turn usurped by one of several co-parceners; in the former case the Bishop's presentee is virtually the presentee of the party who suffers the lapse, though nominally the presentee of the Bishop, whereas the same cannot be said of the presentee of a party usurping. In *The Bishop of London* v. *The Mercers' Company*, the fourth turn belonging to the Company, and the turn in dispute being the fourth turn, the Court had no other point to decide, and were not bound to consider the case of a party usurping a turn out of his order. Indeed in *The Grocers' Company* v. *The Archbishop of Canterbury*, 2 *Bl.* 770. 3 *Wils.* 221. the very point now in dispute was attempted to be raised, but the Court felt it unnecessary to decide it, intimating, however, that it was not altogether a clear point. But the allegation of the right of presentation in the Defendant's

fendant's plea does not amount to an allegation of a right to present once in every two turns, beginning by a presentation on the part of the Plaintiff, but only of a right to present once in every two turns. If so, though the Plaintiff by usurpation procured to himself the two last turns, yet as two new turns are now commencing, *non constat* that the Defendant *Oakes* is not entitled to the first of those two turns. The mode of presenting, as well as the right claimed, must be precisely alleged before the Court can determine whose turn the one now in dispute is; and in the old entries, it will be found to be so alleged. Thus in *Winch. Ent.* p. 825, (*a*) *title Quare Impedit*, the right claimed is *quâlibet alternâ vice*, which defines the mode of presenting so far as to exclude the possibility of either party ever presenting twice together. Again, in the same book, p. 684, (*b*) the right claimed is to present four turns in every five turns, viz. "*ad presentandum ad eandem ecclesiam quatuor primis turnis vel vicibus insimul concurrentibus, in quibuslibet quinque turnis vel vicibus proximè concurrentibus vacantibus.*" Where advowsons are in coparcenary, the mode of presenting may be regulated by agreement. Now the fair mode of regulating the right of presentation between two coparceners, would be to give the first of the two first turns to one, and the first of the two second turns to the other; one taking the first and fourth, and the other the second and third turns. Unless it clearly appear upon this record that such is not the mode in which the right of presentation to the church in question is regulated, the Court will not presume against the Defendant *Oakes*, who has already lost one turn.

Williams in reply observed, that the plea had shewn how the turns were to commence, by alleging that *M. Oakes* had presented "in her proper turn;" but that if that had not been the case, still the Court could not presume any other mode of regulating the turns than that which the law imposes, viz. turn and turn, beginning from the eldest, until an agreement of a different nature was shewn; and that none such had been shewn by the Defendant *Oakes*, on whose behalf it should have been pleaded if it existed.

Lord ALVANLEY, Ch. J. The question in this *quare impedit* arises upon the third plea only, and upon that plea I am of opinion that the Plaintiff is entitled to judgment in favour of his demurrer. The plea states that one *M. Oakes* (under whom the Defendant

(*a*) *Ed.* 1680, or p. 715 in the other edition. (*b*) *Ed.* 1680, or 650 in the other edition.

1803.
Birch
v.
The Bishop of Litchfield and Others.

claims) in 1731 "was seised of and in one moiety of the advowson of the said church, to present to the said church one turn in every two turns, in gross by itself as of fee and right;" and it proceeds to allege that the said *M. Oakes*, in the said year, "presented to the said church, being then vacant, in the proper turn of the said *M. Oakes*." It then alleges that the next presentation was by *John Wyrley*, Esq. (under whom the Plaintiff claims) "in the proper turn of the said *John Wyrley*." What are we to conclude from this statement, but that the predecessors of the present disputing parties had each a moiety of the advowson, and that each presented in succession, which presentations are admitted to be "in their proper turns." Unless some express agreement, shewing a different mode of presentation, be brought before the Court, are we not to presume that course to have been pursued which the law points out, *viz.* that where one party presents to the first turn, he presents to the third turn also. The mode in which the presentations are alleged to have taken place, is evidence of the mode in which they ought to continue to take place; and if there be any existing agreement of a different nature, it ought to have been pleaded. It is too late now to call upon the Court to presume that the party who had the first turn was to have the fourth, and the party who had the second turn was to have the third: any regulation of that kind, arising out of agreement between the parties, should have been stated on the record. The plea then proceeds to deduce the title of the Plaintiff and Defendant, and to shew that the Plaintiff has presented to the two last turns, averring, "whereby it then and there belonged, and still belongs, to the said *C. Oakes* to present a fit person to the said Church." But it does not appear whether the Plaintiff presented to the said turn by usurpation, or by agreement between him and the person whose turn it was to present; and on that point the plea is too loose and uncertain. Supposing the Plaintiff to have usurped upon the Defendant, I do not wish to give any opinion as to what operation that usurpation would have had upon the turn now in dispute, though as at present advised, I think that inasmuch as it was the Defendant's fault for permitting such usurpation, he must suffer for his own negligence. It is not possible to understand this right of presentation as alleged in the plea, to be any other than an alternate right; and it is not shewn whether the Defendant lost his turn last time by the usurpation of the Plaintiff or

or by his own consent. The Defendant, therefore, in this third plea, has shewn no bar to the Plaintiff's claim.

Heath, J. I am of the same opinion.

Rooke, J. I am of the same opinion, on the ground that the Defendant's plea is too vague and uncertain.

Chambre, J. I have not much doubt on the principal point, for if the Plaintiff did usurp upon the Defendant, still I think we should hardly say that the Defendant may now usurp upon the Plaintiff by way of retaliation. It is not necessary, however, to consider that point upon these pleadings. The argument respecting the right claimed upon the plea is ingenious, but not sound; if any other than the usual mode of presentation had been agreed upon by the parties, the Defendant should have pleaded that agreement.

Judgment for the Plaintiff

DUMSDAY, Demandant, *v.* Sir RICHARD HUGHES, Bart. and JOHN BEDFORD, Tenants.

June 20th.

In the count of a writ of right it is not sufficient to state that the lands descended to four women, as nieces and coheirs of *J. S.* without shewing how they were nieces. The Court will not give leave to amend the count in a writ of right, unless a favourable case be made out by affidavit.

WRIT OF RIGHT. The count was as follows:

Sussex, to wit. *John Dumsday*, by *W. C.* his Attorney, demands against Sir *R. H.* Bart. and *J. B.* 10 messuages, 10 cottages, 30 barns, 30 stables, 30 outhouses, 20 gardens, 20 orchards, 500 acres of meadow land, 500 acres of pasture land, 500 acres of arable land, and 200 acres of wood, with the appurtenances, in the several parishes of *Fletching* and *Worth*, in the county of *Sussex*, as his right of inheritance, by writ of the lord the King of right; and thereupon he saith, that *Shadrack Blundell*, late of *East Bergholt*, in the county of *Suffolk*, was seised of the tenements aforesaid, with the appurtenances in his demesne, as of fee and right, in the time of peace in the time of the Lord *George* the Second, late King of *Great Britain*, to wit, within sixty years now last past, by taking the *esplees* thereof to the value, &c. and died thereof seised. And the said *John Dumsday* further saith, that upon the death of the said *Shadrack Blundell*, the right to the said tenements, with the appurtenances, descended and came to one *Mary Bushby* (formerly *Mary Blundell*), one *Elizabeth Blundell*, one *Jane Dumsday* (formerly *Jane Blundell*), and one *Hannah Gregory* (formerly *Hannah Blundell*), as cousins and heirs of the said *Shadrack Blundell*: that is to say, as nieces and co-heirs of one *John Blundell*, who

1803. DUMSDAY v. HUGHES, and Another

was son and heir of one *John Blundell*, who was son and heir of one other *John Blundell*, who was son and heir of one other *John Blundell*, which said last-mentioned *John Blundell* was father also of one *Nicholas Blundell*, who was father of one *Shadrack Blundell*, who was father of the said *Shadrack Blundell*, last-above seised of the said premises as aforesaid; and from the said *Mary Busbby*, *Elizabeth Blundell*, *Jane Dumsday*, and *Susannah Gregory*, the right to the said tenements with the appurtenances descended and came to the said *Mary Busbby*, *Jane Dumsday*, and *Hannah Gregory*, as the surviving sisters and co-heirs of the said *Elizabeth Blundell*, and from the said *Mary Busbby*, *Jane Dumsday*, and *Hannah Gregory*, the right to the said tenements with the appurtenances descended and came to the said *Mary Busbby*, *Hannah Gregory*, and the said *John Dumsday* the demandant, as surviving sisters, son, and co-heirs of the said *Jane Dumsday*; and from the said *Mary Busbby*, *Hannah Gregory*, and the said *John Dumsday* the demandant, the right to the said tenements with the appurtenances descended and came to the said *Hannah Gregory* and the said *John Dumsday* the demandant, as the only surviving sister, nephew, and heirs of the said *Mary Busbby*, she the said *Mary Busbby* having died without issue; and from the said *Hannah Gregory*, and the said *John Dumsday* the demandant, the right to the said tenements with the appurtenances descended and came to the said *John Dumsday* the now demandant, as nephew and heir of the said *Hannah Gregory*, who was the surviving cousin and heir of the said *Shadrack Blundell*, last above seised as aforesaid; and that such is the right of him the said *John Dumsday* the demandant, he offers, &c. After several imparlances the following abridgment of the Plaintiff's demand was put in:—

Sussex, to wit. *John Dumsday*, by *W. C.* his attorney, demands against Sir *R. H.* Bart, and *J. B.* 4 messuages, 3 barns, 3 stables, 4 orchards, and 120 acres of arable meadow pasture and wood land, with the gardens and appurtenances in the several parishes of *Fletching* and *Worth*, in the county of *Sussex*, as his right of inheritance, by writ of the lord the King of right: And it is to be known that the said *John Dumsday*, in the court of the King here made his demand, in the said writ, of 10 messuages, 10 cottages, 30 barns, 30 stables, 30 outhouses, 20 gardens, 20 orchards, 500 acres of meadow land, 500 acres of pasture land, 500 acres of arable land, and 200 acres of wood, with the appurtenances and

 now

now abridges his demand to the said 4 messuages, 3 barns, 3 stables, 4 orchards, and 120 acres of arable meadow pasture and wood land, with the gardens and appurtenances, &c. To this there was a demurrer, assigning for causes, "that it does not appear in or by the said count, how or in what manner the said *Mary Busbby*, *Elizabeth Blundell*, *Jane Dumsday*, and *Hannah Gregory*, were the nieces and co-heirs of the said *John Blundell* in the said count first mentioned, and for that the said count is in other respects defective, insufficient, and informal."

Bayley, Serjt. in support of the demurrer, objected, first, that the count was defective in not shewing how the four persons named in the special demurrer were nieces of *John Blundell*; and, secondly, that it was not competent to the demandant in this case to abridge his demand (*a*). On the first point he was proceeding to observe, that descents are either immediate, as from father to son, or mediate, as from uncle to nephew; that in the latter case, where some one person necessarily intervenes between the ancestor and the heir, the demandant is bound to state such intervening person, since he might possibly be subject to a disability which might prevent the descent, as alienage, attainder, &c. and cited *Collingwood v. Pace*, 1 *Vent*. 415. when the Court called upon the demandant's counsel to support the count.

Best, Serjt. for the demandant, admitted, that the count could not be supported, but applied for leave to amend, and cited *Scot* v. *Perry*, 3 *Wils.* 206. 2 *Bl.* 758. S. C. where an amendment was allowed in *formedon*, and *Theol. Dig. lib.* 8. *c* 28. *s.* 21. where the same was permitted in a writ of dower, and urged that it was the constant practice to amend in common recoveries, which were in fact real actions.

(*a*) In 14 *H*. 6. 3 *b*. 4 *a*. *Bro. Ab.* tit. *Abridgement*, *Pl.* 12. *Iwyn*, Ch. J. said, "that in all cases where the writ is *de libero tenemento*, as in assise, the writ is *injustè disseisivit eum de libero tenemento suo*; and in writ of dower the writ is *rationabilem dotem quod ei contingit de libero tenemento*, of one *W*. her husband; and in writ of right of ward, the writ is *custodiam terræ et hæredis*; in these cases, and such like, the demandant may abridge his plaint or demand; and the reason is, that although he abridges one acre of land, still the writ is good *de libero tenemento*; but in *præcipe quod reddat*, where certain acres are demanded, there he cannot abridge, for then he would falsify his own writ, and where the writ is acknowledged to be false in part, it shall abate for the whole; and in assise *de libero tenemento*, in *A* and *B*, the plaintiff cannot abridge in *B*, for then his writ would be false." For more concerning abridgements, see *Bro. Ab.* tit. *Abridgement*, and *Booth on real Actions*, p. 295; also the statute 21 *H*. 8.

1803.
DUMSDAY *v.* HUGHES and Another.

The *Court* thought that the first objection to the count was clearly good, for that the four persons stated to be nieces and coheirs of *John Blundell*, might either be four daughters of one brother or sister of *John Blundell*, or daughters of four several sisters of *John Blundell*: and with respect to the amendment, they observed, that it was not of course to amend, but that the demandant ought to make out a case by affidavit; saying, that the case of dower could afford no authority in a writ of right; it being a maxim that three things are always favoured in law, life, liberty and dower. The *Court* therefore only granted a rule to shew cause for an amendment. And on a subsequent day that rule was discharged, on account of the insufficiency of the affidavit, and judgment was given for the tenants.

June 22d.

TURNER v. EYLES.

In an action of escape out of execution, the declaration alleged that the prisoner was, by *habeas corpus*, brought before a judge of K. B. and by him committed to the custody of the marshal, "as by the said "writ of *habeas* "*corpus*, and "the said "commitment thereon now remaining in "the said "Court more "fully appears." Held that evidence of a commitment by a judge of K. B. but not filed of record, would not support the action. Held also that the above allegation (even if unnecessary) must be proved as laid.

THIS was an action against the Defendant, as warden of the *Fleet*, for an escape of a prisoner in execution. The second count of the declaration in which the question arose, stated, that the Plaintiff, by a judgment of the Court of King's Bench, had recovered a certain debt, together with damages and costs, against one *T. Johnson*, whereof 67l. parcel thereof was satisfied; that the Plaintiff for having execution of the residue in *Trinity* Term, 42 *Geo.* 3. sued a *ca. sa.* out of the said Court upon the said judgment, directed to the Sheriff of *Middlesex*, who took the said *T. J.* in execution, and detained him in custody by virtue of the said writ, until the said *T. J.* afterwards, to wit, on, &c. by virtue of an *habeas corpus*, was brought before Sir *Soulden Lawrence*, Knight, and then alleged that "thereupon the said *T. J.* was then and there committed by the said Sir *S. Lawrence*, to the custody of the marshal of the *Marshalsea* of our said lord the King, there to remain at the suit of the Plaintiff, until he should have satisfied the said Plaintiff, the said residue of the said debt, and damages in the said writ of *ca. sa.* mentioned as by the said writ of *habeas corpus*, and the said commitment thereon now remaining in the said Court more fully appears." It then further stated, that the marshal detained the said *T. J.* in his custody, charged with the said *ca. sa.* at the suit of the

Plaintiff,

1803. TURNER v. EYLES.

Plaintiff, until he was by another writ of *habeas corpus* sued out of the Common Pleas, brought before Sir *Alan Chambre*, Knight, one of the justices of our lord the King of the Bench, and by him committed to the *Fleet*, in execution, until he should satisfy the residue of the debt, and damages in the said *ca. sa.* mentioned, as by the said writ of *ca. sa. habeas corpus*, and return thereof, and commitment thereon, now remaining in the said Court of our said lord the King more fully appears; and that by means thereof the Defendant, being warden of the *Fleet*, had the said *T. J.* in execution for the residue of the said debt and damages, until he afterwards voluntarily suffered him to escape.

At the trial of this cause before Lord *Alvanley*, Ch. J. at the *Westminster* sittings after last *Easter* term, the Plaintiff, in order to prove that part of the declaration which alleged that *T. J.* was committed to the custody of the marshal, charged with the *ca. sa.*, called the marshal of the King's Bench, who produced the writ of *habeas corpus*, with the commitment of Mr. Justice *Lawrence* indorsed thereon, but stated that the writ was brought from his own office, not having been filed of record in the Court of King's Bench. Upon this it was objected that the commitment could only be proved by evidence of a commitment, filed of record in the court to which the judge belonged by whom the commitment was made; and even if that were not necessary in all cases, still that the Plaintiff, by the terms in which he had alleged the commitment in his declaration, had tied himself up to such proof. Lord *Alvanley* being of this opinion, nonsuited the Plaintiff.

A rule *Nisi* for setting aside this nonsuit having been obtained on a former day,

Shepherd and *Best*, Serjts. now shewed cause. First, a commitment must be proved by matter of record. The Court cannot take notice of a party being in custody, unless he appear to be so by the records of the Court. In *Holland* v. four others, *Cro. Eliz.* 605, the Plaintiff brought an appeal of murder against the Defendants by original, at the return of which the Defendants appeared at the bar; whereupon the Plaintiff having discovered a fault in the writ, would have declared against them *in custodiâ Mareschalli*: but the Court said "that the appearance of the Defendants did not make them *in custodiâ Mareschalli*, unless there be a record *quod committitur Mareschallo*, or that they find bail, otherwise not."

In

1803.
TURNER v. EYLES.

In the case of *Wightman* v. *Mullens*, 2 *Str.* 1206, which was an action against the marshal for an escape, the declaration averred a commitment by Sir *William Chapple*, "as by the said commitment may more at large appear." And upon special demurrer, the declaration was holden to be bad, for want of shewing a commitment of record, the Court saying, "he is not in point of law in the marshal's custody until the commitment is entered of record." It is true that in *Wate* v. *Briggs*, 1 *Ld. Raym.* 35. S. C. 2 *Salk.* 565. the same objection was over-ruled on general demurrer; but it may be observed, that the objection could not have prevailed in *Wightman* v. *Mullens*, even upon special demurrer, if the proof of a commitment not of record would have been sufficient to sustain the action. The difference between a general and a special demurrer, only relates to the form of pleading. And whatever omissions may have been made in the pleading, the same proof is always necessary to maintain the action. Thus, if an action be brought upon a judgment, and the plaintiff omit to add *prout patet per recordum*, the Defendant can take no advantage of such omission, unless he demur specially; yet the Plaintiff must prove his judgment by a copy of the record, in the same manner as if it had been alleged to be of record. In this case it was the duty of the Plaintiff to have completed the record before he brought his action; had he done so, the record would have related back to the day on which the prisoner was committed by the judge. In the case of *Kirk* v. *French*, 1 *Esp. N. P. Cas.* 81. which was an action for a malicious arrest, the Plaintiff, in order to prove that the first action was at an end, produced an order of a judge to stay proceedings; and Lord *Kenyon* inclined to think the evidence insufficient. Secondly, the Plaintiff has rendered proof of a commitment of record necessary, by the averment which he has introduced. The distinction between immaterial and impertinent averments is now perfectly settled. If the whole averment might be struck out without destroying the cause of action, the averment is impertinent, and need not be proved. But if the whole cannot be struck out, though a part of it need not have been stated, the averment must be proved as laid. Admitting, therefore, that a *committitur* not entered of record would have been sufficient to support the action, yet as it was necessary to allege a commitment of some sort, and the Plaintiff has thought proper to aver a commitment of record,

he is not at liberty to prove any other ſpecies of commitment. This diſtinction was acted upon in *Savage* v. *Smith*, 2 *Bl.* 1101; and *Briſtow* v. *Wright*, *Doug.* 665. *ed.* 2. and was recognized by *Lawrence*, J. in *Williamſon* v. *Allinſon*, 2 *Eaſt*, 452.

Vaughan and *Bayley*, Serjts. ſhewed cauſe. Firſt, it was altogether unneceſſary, in this caſe, to aver a commitment of record. There is a diſtinction between thoſe caſes where the Defendant being already in the cuſtody of the marſhal, the Plaintiff afterwards charges him in execution, and thoſe where the Defendant being in execution at the Plaintiff's ſuit, is removed by *habeas corpus* into the marſhal's cuſtody. In the former it is neceſſary to enter the commitment of record, but in the latter it is not. If the Defendant be already in the marſhal's cuſtody, it is neceſſary that the plaintiff ſhould do ſome act in order to ſhew his election to charge him in execution, before he can maintain an action againſt the marſhal for an eſcape. The neceſſity of ſome act being done to ſhew the Plaintiff's election in ſuch caſe was eſtabliſhed in *Watſon* v. *Sutton*, 1 *Salk.* 272, and *Fotterel* v. *Philby*, 3 *Burr.* 1841; and probably the caſe of *Wightman* v. *Mullens*, where it was holden neceſſary on ſpecial demurrer, to add the words *prout patet per recordum*, was a caſe in which the party was in cuſtody before he was charged in execution by the Plaintiff. But where the Plaintiff has completed his execution before the Defendant is committed to the cuſtody of the marſhal, there ſeems to be no reaſon why he ſhould be obliged to enter the commitment of record. The Defendant being legally in execution, the Plaintiff has a right to expect that he will be ſafely kept notwithſtanding any removal by *habeas corpus*. The Plaintiff is no party to the *habeas corpus*, nor has he any notice of it; and as his election to take the Defendant in execution has been made previous to the removal of the Defendant by *habeas corpus*, it ſeems to be equally unneceſſary and unreaſonable to require that he ſhould enter the commitment of record. Secondly, if it was not neceſſary to aver the commitment to have been of record, the averment of a commitment has been ſufficiently proved, for that part of the declaration which ſtates, that the commitment remained in the Court of King's Bench, may be rejected as ſurpluſage. In *Peppin* v. *Solomons*, 5 *T. R.* 496, it was held, that an averment, without which the declaration would be perfect, need not be proved. Now it appears from the caſe of

1803. TURNER v. EYLES. *Waite* v. *Briggs*, that the declaration in this case would have been perfect, if the averment that the commitment remained in the Court of King's Bench had been omitted, for the commitment is only matter of inducement. The cases cited do not apply. With respect to the case in *Cro. Eliz.* though the Defendant was at the bar of the King's Bench, it was not proved by any evidence, that he was committed to the custody of the marshal, and consequently the Court could not take notice that he was in such custody. The contract stated in *Bristow* v. *Wright*, being an entire thing, it was incumbent on the Plaintiff to prove his contract as he had laid it. The case of *Savage* v. *Smith*, was an action by an informer against a sheriff's officer, for exacting illegal fees upon a *fi. fa.*; and as he averred that the *fi. fa.* issued upon a judgment previously described in the declaration, he was bound to prove that judgment, though he need not have stated the judgement at all.

Lord ALVANLEY, Ch. J. It was clearly necessary to prove a commitment of *T. Johnson* to the custody of the marshal. Without an allegation of some legal commitment the declaration would have been bad, and in order to maintain the action that allegation must be proved. If then the whole averment respecting the commitment to the marshal, could not have been struck out of the declaration, the question is, Whether it was not incumbent on the Plaintiff, to prove the commitment as alleged; that is to say, not merely a commitment on paper indorsed by Mr. Justice *Lawrence*, but a commitment remaining of record in the Court of King's Bench? Let us first consider whether a commitment, not of record, would have been a good commitment. I do not understand the distinction which has been attempted as to the necessity of entering on record commitments on *mesne* process, and not entering commitments in execution. It is true that the report of *Wightman* v. *Mullens*, does not state that the commitment was in execution, but only that the party was committed by Sir *W. Chapple* at the suit of the Plaintiff, as by the said commitment may more at large appear. There the Court was of opinion, that a commitment not of record was no legal commitment, and that the Plaintiff might as well have alleged no commitment at all. It does not appear to be material, whether the commitment were on *mesne* process, or in execution; but that case strikes me to be a complete authority, for saying, that the act of a single judge, unless adopted

by

by the court to which he belongs, is of no validity. As the courts do not sit in vacation, many things are done by the judges individually; but their acts, when recognized, become the acts of the court: and I believe there is no instance in which effect has been given to those acts in an action at law, unless they have been previously put upon the records of the court. The course of pleading affords the strongest proof of this doctrine, it being the constant practice to allege a commitment of record: and in the case of *Wightman* v. *Mullens*, the declaration was holden bad upon special demurrer for want of such an allegation. It is asked, who is to enter this commitment of record? I say the plaintiff is to enter it if he wants to avail himself of the commitment, and on his application the Court of King's Bench would compel the marshal to assist him in making this entry: for if the act of the single judge be a lawful act, no doubt the Court will not only recognize that act, but do any thing in their power to make it effectual in support of any claims sought to be derived under it, by persons entitled to make those claims. I am therefore of opinion, that the allegation of the commitment would have been imperfect, if it had not been an allegation of a commitment now of record. But even if such an allegation had not been necessary, (though on this point I speak with great deference to those who are better skilled in the science of pleading than myself,) still I think the form of the allegation such as to have required proof of a commitment of record; for the plaintiff having stated a commitment of a particular kind, was not at liberty to prove a commitment of any other species, though the particular description might have been unnecessary. The case of *Savage* v. *Smith*, and the other cases, proceed upon this principle, that where the whole of the allegation is unnecessary, there it may be struck out. With respect to the case of *Williamson* v. *Allison*, the knowledge of the Defendant was perfectly immaterial, and in case of a *tort* all the aggravation need not be proved. We all know, that if a party derive his right of action against the debtor through a variety of deeds, instead of charging him generally by virtue of divers *mesne* assignments, he must prove the deeds as stated. So if a party claiming under a demise, take upon himself to state a demise by indenture, he must prove his allegation though a general averment of a demise would have been sufficient.

 For

1803.

TURNER v. EYLES.

For these reasons I am of opinion, that even on the second ground the nonsuit ought to be sustained.

HEATH, J. I am of the same opinion on both grounds. It is clear that an action for an escape cannot be maintained without a commitment; and the first question is, Whether it be necessary that such commitment should be entered of record, or whether the signature of a judge be sufficient? For certain purposes the signature of the judge is sufficient; it is a warrant to the officer to enter the commitment of record. In the same manner if a judgment be signed, it is sufficient for certain purposes: but if an action be brought upon that judgment, the record must be made up and produced. This affords an answer to the observations which have been made respecting the practice of the officer keeping the commitments. He keeps them until they are called for; but when called for he must enter them. With respect to the second point, as the commitment has been described in a particular manner, in a necessary and material averment, it must, according to all the cases cited, be proved as it has been described.

ROOKE, J. I am of the same opinion upon both points. I am by no means prepared, however, to say that it is necessary in a declaration of this sort to aver a commitment of record. It rather appears from some cases that a commitment may be stated generally. For if the commitment be stated to be of record, it shall not be tried by the record, but *per pais*, it being matter of fact not conclusive upon the party. This appears from *Middleton* v. *Manucaptors of Sylvester*, 1 *Sid.* 216, and *Conny* v. *Jacob*, 1 *Sid.* 220. where it is said, that if a commitment on record were conclusive, it would be in the power of any attorney to make an entry of a commitment on record, though the party were not in custody. The record therefore, not being conclusive, it does not appear to me to be necessary to state it in a declaration for an escape; but still, whether the commitment be so stated or not, it must be proved by an entry of record as appears from *Rex* v. *Povey*, 1 *Sid.* 237. It is as necessary to make the record complete with respect to a commitment, as with respect to an execution. Before the Plaintiff can maintain an action, he must prove a complete title by shewing, that the party was in the legal custody of the marshal, which must be by a commitment of record. It is asked

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1803. THRASK v. EYLES.

who is to make the entry? The answer is, either the Plaintiff must do it himself, or if the marshal should refuse to permit him so to do, he must apply to the Court, who would compel their officer to permit him. Though the officer is allowed to keep the commitments for his own security, he will not be allowed so to keep them as to discharge himself from an action of escape. It seems to me that both reason and authority concur in requiring, that the commitment should be entered of record. If, however, this be doubtful, still I am of opinion, on the second point, that the commitment ought to have been proved as laid. I cannot think that part of an averment can be considered as material, and the other part as surplusage. As the Plaintiff in this case has taken upon himself to state a commitment of record, he was bound to prove a commitment of that description, and having failed to do so, I think that the nonsuit was right.

CHAMBRE, J. I entirely agree with the rest of the Court. In the course of the argument, we have been led to consider the distinction between that which is matter of inducement, and that which is the immediate cause of action. But the cases upon that subject relate merely to the manner of averring different instruments in the declaration; and indeed the language of those cases does not appear to me to be very correct. But although the commitment, in this case, be matter of inducement, it cannot be said to be immaterial; it is as much the foundation of the action as the act of escape itself; it is the first stone in the action. The cases which relate to the necessity of proving particular averments, only distinguish between that which is material and that which is impertinent; but make no distinction between that which is inducement and that which is the immediate cause of action. It is also said in some of the cases, that where matter of fact and matter of record are united in the declaration, the Defendant may blend them upon a plea of *nil debet*. But do those cases say any thing respecting the proof? If a *prout patet per recordum* be not stated, it is merely matter of special demurrer; but though if it be not specially demurred to the declaration is good, still it must be proved. Suppose an action brought on a judgment, and *prout patet per recordum* be omitted; there must, nevertheless, be the same proof given as if it had been stated. Can it be said that a Defendant would not be at liberty to desert the matter of fact, and put his defence upon the want of a

1803.
TURNER v. EYLES.

record? He might refer the issue to the Court upon that defect, for there would be no cause of action arising from the judgment, if there were no record of a judgment. We now come to the question, Whether it be absolutely necessary that the *committitur* should be entered of record before legal evidence can be produced? Several authorities have been cited to shew that it is necessary, and none have been cited to the contrary. No reason has been adduced to shew that there is any distinction between this act of a judge out of court, and any other order by a judge out of court. Now in all cases the acts of a single judge out of court must be recognised by the Court in order to give them validity; nor can they be considered to be the acts of the Court until they be entered of record. Perhaps instruments of this sort, are not, strictly speaking, records, but for the purpose of the present argument they may be so considered, and whenever circumstances require that they should be legally proved, they must appear to be filed of record. The case in *Cro. Eliz.* as well as that of *Wightman* v. *Mullens*, are decisive of this point; and before we get rid of those authorities, we must be furnished with some principle of law upon which we may decide contrary to them. But though it be said that the commitment is only the act of a single judge, still it must be remembered that his act is the act of the Court to which he belongs; and indeed the writ of *habeas corpus* being returnable before the chief justice, unless the single judge act for the Court to which he belongs, and his act be adopted by the Court, it would seem to be without any authority. On this part of the case, therefore, I am clearly of opinion that the nonsuit was well warranted. If it were necessary to go further, I should say that the latter part of the averment, which the Plaintiff contends may be laid out of the case, is not capable of being separated from the former part, or treated as an immaterial and distinct averment. It is a description of the instrument of commitment, and must be considered in the same way as if it had been alleged in an earlier part of the sentence. The averment amounts to this, viz. that by a record of the Court of King's Bench, *T. J.* was committed to the custody of the marshal. The latter words being descriptive of that which was a necessary part of the cause of action, how can we vary from that description? The cases on this subject are confined to descriptions of contracts, though it has sometimes been said that a contract is an entire thing

in order to distinguish cases of that sort from others. But an instrument of commitment is also an entire thing. In *Savage* v. *Smith* the Plaintiff having described the *fieri facias* as founded on a particular judgment, and having failed in proving the judgment was nonsuited; for the *fieri facias*, so described, was an entire thing. A substantial part of the inducement to the action having been alleged, and not proved, the Plaintiff was prevented from recovering. That case has been cited with approbation in the King's Bench, and even supposing it not to be necessary that the commitment should be entered of record, I cannot distinguish that case from the present. It seems to me indeed, that no injury can arise to any one from requiring that the commitment should be entered of record. The marshal, in whose possession the instrument remains, may put it on record if he shall have occasion to make use of it, and if it should become necessary for any other person, such person, if the marshal should refuse, may apply to the Court, who will compel their officer to do what is right, and when the commitment is once entered of record, it refers to the time of the original order. This nonsuit therefore appears to me to have been perfectly right.

Rule discharged.

SMITH and Another, Assignees of R. DRAKE and EBENEZER GODDARD *v.* WILLIAM GODDARD.

June 28th.

A. and *B.* being partners in trade, *A.* committed an act of bankruptcy, a few days after which *B.* also committed an act of bankruptcy. Between the two acts of bankruptcy a clerk of the house paid to *C.* a creditor of the house, at his request, 558l. and after both acts of bankruptcy 5l. more. The assignees, under a joint commission against *A.* and *B.* brought an action against *C.* to recover these sums of money, and declared, first, for money had and received to the use of *A.* and *B.* before they became bankrupts; second for money had and received to their own use, as assignees of *A.* and *B.* after the bankruptcy of *A.* and *B.*, and third, for an account stated with them as such assignees; held, that under this declaration the assignees were only entitled to recover the 5l. paid after the bankruptcy of both partners. *Semb.* that if they had declared for money had and received to their use, as assignees of *A.* they might have recovered one moiety of the 558l. paid between the two acts of bankruptcy.

ASSUMPSIT. The first count of the declaration stated, that the Defendant, before *R. Drake* and *E. Goddard* became bankrupts, was indebted to the said *R. D.* and *E. G.* for money had and received to their use, and being so indebted promised to pay. The second count stated, that after the bankruptcy of *R. D.* and *E. G.* the Defendant was indebted to the Plaintiffs, as assignees, for money had and received to their use as such assignees, and being so indebted promised to pay. There was also a third count, on an account stated between the Plaintiffs, as assignees, and the Defendant. The Defendant pleaded *non-assumpsit*, and gave a notice of set-off.

At

1803.
Smith and another, v. Coates.

At the trial before Lord *Alvanley*, Ch. J. at the *Westminster* sittings, after last *Hilary* Term, it appeared that *R. Drake* and *E. Goddard* carried on business in partnership, that *E. G.* committed an act of bankruptcy on the 8th of *February*, 1802, and *R. D.* on the 17th of the same month in the same year; that a few days previous to the first act of bankruptcy, a large sum of money was paid into the house on account of the Defendant; that between the 8th and 17th of *February* several sums of money, amounting to 558l. were paid to the Defendant, by a clerk of the house, in consequence of the former having insisted on such payment, there being evidence to shew that he was acquainted with the insolvent situation of that house; that on the 28th of *February* 5l. more were paid to the Defendant; that up to the 17th when *R. D.* became bankrupt, the balance of accounts between the partnership and the Defendant continued to be in favour of the latter, and that the trade continued to be carried on by the bankrupts till the 15th of *March*. The Plaintiffs were assignees under a joint commission against *R. Drake* and *E. Goddard*. The jury found a verdict for the Plaintiffs for 563l. but liberty was reserved to the Defendant to move that a nonsuit might be entered, if the Court should be of opinion the the Plaintiffs were not entitled to recover any thing, or that the verdict might be entered on such count, and for such sum as the Court should think the Plaintiffs entitled to recover.

Accordingly *Praed*, Serjt. obtained a rule *nisi* upon two grounds; first, that neither of the counts in the declaration was so framed as to entitle the Plaintiffs to recover, because the money being paid to the Defendant after the act of bankruptcy committed by *E. Goddard*, but previous to that committed by *R. Drake*, the Defendant was not indebted to the partners before their bankruptcy, as alleged in the first count; nor to the assignees after the bankruptcy of both, as alleged in the second count, for *R. Drake* being solvent when the money was paid to the Defendant, it was money received by the Defendant to the use of the Plaintiffs, as assignees of *E. Goddard*, and to the use of *R. Drake*. Secondly, that as the balance, when *R. Drake* became bankrupt was in favour of the Defendant, the assignees could not recover on any demand prior to *R. Drake*'s bankruptcy, since the 5 *Geo.* 2. *c.* 30. *s.* 28. directs the assignees to strike a balance when there have been mutual debts or credits, and that balance must be taken at the time when both

15 partners

partners become bankrupts, and that at all events therefore, the Defendant must be allowed the money received by the bankrupts on his account, before the bankruptcy of either.

Best, Serjt. now shewed cause. The authority of the clerk who paid the money to the Defendant, having been derived from the partnership of *Goddard* and *Drake*, and that partnership having been dissolved by the act of bankruptcy of the former, the money must be considered as having been paid without authority, and ought therefore to be refunded. At all events, however, the Plaintiffs are entitled to recover one moiety of the 558*l.* paid subsequent to the bankruptcy of *E. Goddard*, as well as the 5*l.* paid after the bankruptcy of *Drake*. The ground upon which one of two partners in trade is authorised to dispose of the partnership effects, is that of implied agency. Though one tenant in common of a personal chattel be entitled to take possession of the whole, yet he cannot convey more than a moiety of the interest; if therefore, one of two partners become bankrupt, as the partnership is thereby dissolved (*a*), no agency can any longer be implied; consequently the solvent partner can dispose of no more than his moiety of the property. Upon the bankruptcy of *E. Goddard*, therefore, a moiety of the partnership property passed to his assignees, who became tenants in common with the solvent partner. The assignees, under a joint commission, are entitled to the joint and separate property of both partners; they have no specific character as assignees of each partner, but if any property belonging to one of the partners has been made away with, they will be entitled to sue for it as assignees, under a joint commission. Nothing more is necessary to be shewn, than that the property was vested in them at the time the action was brought. Nor can there be any set-off under the statute in this case; for the debt, upon which the Plaintiffs sue, arose subsequent to the act of bankruptcy of *E. Goddard*, whereas that which the Defendant claims, was incurred previous to that event. If a set-off were allowed in such case, the effect would be to enable one bankrupt partner, after an act of bankruptcy committed by himself to pay a partnership debt to a favourite creditor, without the possibility of the assignees obtaining redress; for to any action brought by the assignees, a set-off arising out

(*a*) See *Smith* v. *Stokes*, 1 *East*, 363; and *Smith* v. *Auriol*, *Id.* 368.

1803.

SMITH and Another v. GODDARD.

of the state of accounts between the creditor and the two partners would be resorted to as equivalent to the whole demand.

Praed, Serjt. *contrà*. The 5 *Geo.* 2. *c.* 30. *f.* 28. directs, that when there have been mutual debts or credit between the bankrupt, and any other person, before the time of the bankruptcy, an account shall be taken, and the balance only shall be paid. These mutual claims are not in the nature of set-off; but the balance only is the debt. If then an account is to be taken up to the time of the act of bankruptcy, the Plaintiffs in this case are not entitled to recover any thing. For at the time when *Drake* became bankrupt, the balance of accounts still remained in favour of the Defendant. It is true that the statute does not expressly direct up to what time the account shall be taken, where several partners become bankrupt: but in the case of a joint commission, the act of bankruptcy by which the commission is supported, and under which the assignees are authorised to sue, is not complete, until all the partners have become bankrupt. If the assignees claim the money paid to the Defendant as a debt due to the estate of *Goddard* and *Drake*, they must allow in account all sums of money due from the estate to the Defendant. If on the other hand they claim one moiety of the money paid as due to the separate estate of *E. Goddard*, and the other moiety as due to the separate estate of *Drake*, they ought to have framed their declaration accordingly. Indeed, in such case the two demands could not be joined in the same action. Where two persons have demands upon a third in separate rights, they ought to sue separately; *Graham* v. *Robertson*, 2 *T. R.* 282. Nor will it make any difference if both creditors become bankrupt, and the same assignees be chosen for both. For where two commissions issued against *A.* and *B.* and the same persons being chosen assignees under both, brought an action against *C.* for debts due to the separate estates of each; it was holden that such debts ought to have been made the subject of distinct actions; *Hancock* v. *Hayward*, 3 *T. R.* 433.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY, Ch. J. This is an action for money had and received, brought by the Plaintiffs as assignees of two persons in partnership, and the money in dispute was paid by the person who acted as clerk in the partnership concerns after an act of bankruptcy committed

mitted by one of the persons, but before an act of bankruptcy committed by the other. With respect to the 5*l.* paid after the bankruptcy of both, the Plaintiffs are clearly entitled to a verdict for that sum; and the only question we have to decide is, Whether the assignees can recover the money in dispute under a count for money had and received to the use of the Plaintiffs, as assignees of both parties? Another question has been raised in this case, which it will be for us to decide, should it be brought before the Court upon another occasion. We are of opinion, that in this case it is not possible to contend with success, that the Plaintiffs ought to recover in the way in which they have declared. No doubt the Plaintiffs are joint assignees of both the partners, and as such they might have sued for money had and received to the use of each; and if there had been a count for money had and received to the use of the Plaintiffs as assignees of the partner who had committed an act of bankruptcy at the time the money was paid, they might perhaps have recovered one moiety. On this, however, we do not mean to give an opinion. It is clear that after the bankruptcy of *Goddard*, the clerk was the agent of such persons as should be chosen assignees of his estate, as well as of *Drake*, who was then absent. But we think that upon the present declaration there is no pretence for saying that the Plaintiffs ought to recover.

Per Curiam, Let a verdict be entered for 5*l.*

SCOTT and Others, Assignees of BERKLEY, a Bankrupt, *v.* PETTIT. *June* 28th.

On the 16th of *March* 1802, goods were forwarded from *Manchester*, addressed to *A* at the *Bull* and *Mouth* Inn London, in consequence of a previous order from him On the 23d of the same month, the goods were sent to the Defendant's house as the packer of *A*, the latter having given no direction at the *Bull* and *Mouth* Inn respecting these particular goods; but having given a general order that all goods addressed to him should be sent to the Defendant; *A* having no warehouse of his own. On the 11th of *March* *A* committed an act of bankruptcy. When the goods arrived at the Defendant's they were booked to the account of *A*, and the Defendant not knowing of *A*'s bankruptcy, unpacked the goods to ascertain the contents On the 31st of *March* the goods were claimed by the consignor, and on the day after by the assignees of *A*, against whom a commission had been taken out. Held that the *transitus* of the goods was at an end when they arrived at the Defendants house; and consequently, that the Plaintiffs, as the assignees of *A*., were entitled to recover them in an action of trover.

TROVER for goods. The cause was tried before Lord *Alvanley*, Ch. J. at the *Guildhall* sittings, after last Easter Term, when the following facts appeared in evidence:

The goods in question had been ordered by the bankrupt who was a merchant in London, of Messrs. *Wallers* of *Manchester*, and were forwarded by them, directed to the Bankrupt at the *Bull* and *Mouth* Inn, on the 16th of *March* 1802. On the 23d of *March*

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1803. SCOTT and Others, v. PETTIT.

the goods were sent from the *Bull* and *Mouth* Inn to the Defendant's house, who was a packer, not in consequence of any orders respecting those particular goods, but in consequence of a general order from the bankrupt to send all goods directed to him to the Defendant's house. On the 11th of *March*, the bankrupt, who lived in lodgings and had no warehouse of his own, absconded, leaving no clerk to accept goods or orders for him. On the arrival of the goods at the Defendant's house, they were booked for the account of the bankrupt; and the Defendant not knowing that the bankrupt had then absconded, and not having any directions from him respecting the goods, caused them to be unpacked with a view to ascertain of what they consisted. On the 31st of *March*, Messrs. *Wallers* having learned the situation of the bankrupt's affairs, claimed the goods from the Defendant, and on the day after they were demanded by the assignees. The Defendant being indemnified by Messrs. *Wallers*, refused to deliver the goods to the Plaintiffs. The jury found a verdict for the Plaintiffs, but liberty was reserved to the Defendant to move for a new trial, or that a nonsuit might be entered.

Best, Serjt. having accordingly obtained a rule *nisi* on a former day, was now called upon to support his rule. When this rule was obtained, two grounds were suggested, 1st, that as the goods were not sent from *Manchester* till after the bankruptcy of *Berkley*, his bankruptcy might be deemed a revocation of the previous order, and consequently, that no right vested in the Plaintiffs. [This point he now abandoned, saying, that though suggested by the Lord Chief Justice before whom the case was tried, yet he felt it too late, after the many decided cases in which a similar circumstance had occurred, without effecting any alteration in the right of the assignees of the bankrupt to claim goods on their arrival, to make this objection, however desirable it might be to establish a different rule from that which had hitherto prevailed]. 2dly, That the *transitus* of the goods was not at an end when they were demanded by Messrs. *Wallers*. Before the right to stop *in transitu* can be defeated, it must appear that the goods have come to the possession of the vendee. It is true, that in *Ellis* v. *Hunt*, 3 *T.R.* 464, where the *transitus* was holden to be at an end, the assignees of the vendee had not taken actual possession, but the messenger under the commission had done an act which was equivalent to taking possession, by put-

ting his mark upon them. In *Hunter* v. *Beale*, cited in the above case, it was determined, that the vendor had a right to stop goods which remained in the custody of the carrier, though the vendee having received notice of their arrival, had given orders to the carrier respecting the disposal of them, and though the carrier himself had done some acts towards carrying those orders into execution. So in *Hunt* v. *Ward*, also cited in *Ellis* v. *Hunt*, where goods had been sent by orders from the vendee to a packer, the latter was considered as a middle man between the vendor and vendee. Though a packer be the agent of a vendee, yet he is not such an agent as can receive the goods into the stock of the vendee. In the case of *Hodgson* v. *Loy*, 7 *T. R.* 440, where goods remained in the hands of a wharfinger, it was held that the right to stop *in transitu* continued, though the wharfinger had general directions from the vendee to forward such goods as should be received on his account to a particular person. Both a wharfinger and a packer receive goods for the mere purpose of forwarding them to their ultimate destination; and therefore while they remain with them the *transitus* is not at an end.

Shepherd and *Bayley*, Serjts. *contrà*, were stopped by the Court.

Lord ALVANLEY, Ch. J. At the trial I could not help forming a wish, that the question, how far the bankruptcy of *Barclay* had operated as a countermand of his previous orders to Messrs. *Wallers*, should be considered by the Court. But on looking into the cases, I find that question to be completely closed in *Westminster Hall*, and that we therefore are bound to hold that, though a bankrupt has altogether ceased to be a trader, yet that his warehouse continues open for the purpose of receiving goods; and that the assignees have a right to take possession of every thing that may come into their hands without paying a single farthing, even though the consignors of the goods are not entitled to come in under the commission. In *Ellis* v. *Hunt*, Lord *Kenyon* says, that it never had been decided, that bankruptcy was of itself a countermand of an order; and in *Bohtlingk* v. *Inglis*, 3 *East*, 381, the goods in question were not delivered on board the ship which was to bring them from *Russia* to the consignee in London, until after the consignee had committed an act of bankruptcy. No doubt, therefore, for the purpose of receiving goods, the assignees stand in the place of the bankrupt. The next question is, Whether, under

1803.

Scott and Others, v. Pettit.

the circumstances of this case, the delivery of the goods to the packer, is to be considered as a delivery to the bankrupt? Undoubtedly there are cases in which packers and wharfingers are to be considered as middle men; but there may always be so a question, Whether in the particular case they are to be so considered or not? Such was the question in *Richardson* v. *Goss* (*a*), and in *Mills* v. *Ball* (*b*). In the last of those cases, we held the wharfinger, at *Exeter*, to be merely a middle man; for though he paid the freight and charges up to that place, yet he was not authorised to impeach them or meddle with them, but was only one of the hands by which the goods were to be forwarded to *North Tawton*, the place of their ultimate destination. In the case of *Richardson* v. *Goss* (*c*), it was not necessary for us to decide, whether the wharfinger was a middle man or not, for the case was decided on the ground, that the consignee of the goods had countermanded his order; but my brother *Chambre* intimated in his opinion, and I perfectly agreed with him at the time, that if a man be in the habit of using the warehouse of the wharfinger as his own, and make that the repository of his goods, the *transitus* will be at an end when the goods arrive at such warehouse. I take the case of the packer, cited in *Ellis* v. *Hunt*, to amount to no more than this; that if a man living at a distance, or living abroad, order goods to be sent to *A. B.* his packer, in order that *A. B.* may hand them on to him; in such case *A. B.* is a mere middle man with respect to the right of stopping *in transitu*. And in *Leeds* v. *Wright* (*d*), we held that the goods, though remaining in the packer's custody, had arrived at the end of their journey; for the packer in that case, was not merely a middle man. In this case it seems to me impossible to raise a doubt, whether the *transitus* was at an end or not; for if the bankrupt had no warehouse to receive the goods, but that of the packer, the *transitus* never could be at an end, if it did not end there. Under all the circumstances of the case, I am clearly of opinion, that the consignees were not entitled to consider the Defendant in the light of a mere packer, and to stop the goods in his custody.

Heath, J. It is much to be lamented, that goods consigned to a bankrupt which arrive after the act of bankruptcy, as in this case, should ever be considered as part of the bankrupt's effects.

(*a*) *Ante*, p. 119. (*b*) *Ante*, vol. 2. p. 457. (*c*) *Ante*, p. 119. (*d*) *Ante*, p. 320.

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The hardship to which this rule of law had given rise, in particular cases, was the occasion of introducing the doctrine of stoppage *in transitu*. The very expression "stoppage *in transitu*," *ex vi termini* implies that there must be a place of ultimate delivery of the goods. If the bankrupt, in this case, had possessed a warehouse of his own, and the packer had merely taken them as a middle man, the consignors might have stopped them. But here there being no other place of delivery than the warehouse of the packer, the goods, when arrived there, had come to their last place of delivery, and consequently were no longer liable to the right of stoppage *in transitu*.

ROOKE, J. I am of the same opinion. I exceedingly regret that such a rule of law should have been adopted, as that which vests in the assignees of a bankrupt the property in goods which arrive after the bankruptcy; for it appears to me to be productive of very great hardships. But the cases are too decisive upon the subject for the Court now to adopt a contrary doctrine. In all the cases where the consignor has been allowed to stop the goods, in the custody of the packer, there has been a place of ulterior delivery in view. In the present instance, there was no place of delivery but the warehouse of the packer. The delivery therefore to the packer, was equivalent to a delivery to the bankrupt himself.

CHAMBRE, J. I am entirely of the same opinion. If the warehouse of the packer were not to be considered as the place of delivery to the bankrupt in this case, there could be no place of delivery at all; for the bankrupt had no other opportunity of receiving goods, but by the hands of the Defendant. However hard the law may in general be thought, which vests the property in goods which arrive after an act of bankruptcy in the assignees of the bankrupt, it would be still more hard in the present instance, if the creditors were not permitted to resort to the property in the hands of the Defendant, since he could have no stock in his own possession. The creditors of a trader generally know whether he has goods in his possession, and trust him accordingly; and the creditors of this bankrupt probably knew that he considered the warehouse of his packer as his own, and that the goods were consigned to him there. In those cases, where the *transitus* of the goods has not been considered as at an end, the goods have only remained with the packer for the purpose of being forwarded to the

1803. Scott and Others, v. Pettit.

the same ulterior destination. In this case there was no ulterior destination, the *transitus* was at an end.

Rule discharged.

June 27th.

DYSON and Others *v.* ROWCROFT.

Policy on fruit from *Cadiz* to *London*, with the usual memorandum. In the course of the voyage the fruit was so much damaged by sea-water, that it became rotten, and stunk; and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also being too much damaged to proceed on the voyage, was sold, and the cargo necessarily thrown overboard. Held that the assured were entitled to recover for a total loss.

THIS was an action on a policy of insurance, which came on to be tried before Lord *Alvanley*, Ch. J. at the sittings after last *Hilary* Term, when the jury found a verdict for the Plaintiffs for 225l. subject to the opinion of the Court on the following case.

On the 28th of *March*, 1802, the Plaintiffs effected a policy of insurance on fruit at and from *Cadiz* to *London*, upon the ship *Tartar*, and the Defendant subscribed the policy for 225*l.* The policy contained the usual memorandum, that corn, fish, salt, fruit, flour, and seed, were warranted free from average, unless general, or the ship should be stranded. The Plaintiffs were interested in the fruit to the amount of the sum insured. The *Tartar* sailed upon the voyage insured, with the fruit on board, on the 15th of *February*, 1802, but having met with tempestuous weather and contrary winds, was forced to put into *Palma*, and afterwards into *Santa Cruz*, where she arrived on the 3d of *May*. In the course of this voyage, the fruit received such damage from the sea-water, that on its arrival at *Santa Cruz*, it was rotten, and stunk to so great a degree, that the government there prohibited the landing it, and it was therefore thrown overboard. The ship was also so much damaged in the course of the voyage, as to be unable to proceed upon the voyage, and was necessarily sold. The question for the opinion of the Court was, Whether the Plaintiffs were entitled to recover?

Best, Serjt. for the Plaintiffs. The cargo, in this case, having been so entirely destroyed through sea-damage, as to render it necessary that it should be thrown overboard, the Plaintiffs are entitled to claim for a total loss. The memorandum in the policy, which declares that fruit shall be free from average, unless the ship be stranded, applies only to cases where the commodity suffers deterioration; but where the whole value of the commodity is destroyed, by any of the perils insured against, the loss is total in its

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nature, and consequently not within the memorandum. In this case, not only was the cargo destroyed, but the ship itself was sold, in consequence of the damage sustained at sea; which circumstances distinguish the present case from that of *Cocking* v. *Fraser*, *Park.* 114.; for as the case there states that the ship did not proceed to *Figara*, the place of her destination, it may be inferred that she was able to proceed; and indeed it does not appear that there was any thing to prevent the cargo being carried to the port of discharge. In *M'Andrews* v. *Vaughan*, *Park.* 115, where, after capture and re-capture, a cargo of fruit was brought to the port of destination, but had sustained damage to the amount of 80 *per cent.*, Lord *Kenyon* said, that to entitle the assured to recover, either the voyage must be lost, or the cargo wholly and actually destroyed. Now here, if it be contended that the cargo was not wholly and actually destroyed, by a peril insured against, still the voyage was lost Indeed Lord *Kenyon*, in the case of *Burnett* v. *Kensington*, 7 *T.R.* 222, observes, that he cannot subscribe to the *dictum* of Lord *Mansfield* in *Cocking* v. *Fraser*, that if the commodity specifically remain, the underwriter is discharged.

Bayley, Serjt. for the Defendant. The object of the memorandum was to exempt the underwriters from particular average, unless the ship be stranded; but if a stranding take place, they are as much liable to particular average as if the memorandum had not been introduced, and the observation of Lord *Kenyon*, in *Burnett* v. *Kensington*, upon the case of *Cocking* v. *Fraser*, is founded upon that distinction; for if the ship be stranded, the underwriters are equally liable, whether the cargo remain in specie or not. The distinction therefore, between a total and a partial loss, as taken in *Cocking* v. *Fraser*, remains unimpeached; if the thing insured be absolutely destroyed, it is a total loss; but if it specifically remain, though of no value, it is an average loss. Though it might be necessary in the present case, to throw the cargo overboard, it does not appear that such necessity arose from any of the perils insured against. When the ship arrived at *Santa Cruz*, the cargo was in existence, and the act of the crew in throwing it overboard, cannot vary the respective rights of the assured and the underwriter. In *Cocking* v. *Fraser*, though the ship did not proceed to her place of destination, and the cargo was so much damaged as to be rendered

1803.
Dyson and Others v. Rowcroft.

of no value in the middle of the voyage, still the assured were not allowed to recover. That case, therefore, is decisive of the present.

Lord ALVANLEY, Ch. J. If I understand the policy as restrained by the memorandum, the underwriter agrees, that all commodities shall arrive safe at the port of destination, notwithstanding the perils insured against; but that he will not be liable to pay for any partial loss on fish, or the other articles contained in the memorandum, because those commodities being liable to deterioration from many circumstances independent of the peril insured against, he would continually be harassed with claims for partial loss alleged to have arisen from the perils mentioned in the policy. Unless therefore the consequence of the damage sustained be the total loss of the commodity, the underwriter does not agree to be answerable; but if the commodity be totally lost to the assured, he undertakes to pay. If this be not the meaning of the memorandum, it is badly expressed; and the underwriters would have done better if they had said, that they would not be answerable unless the commodities enumerated actually went to the bottom. The question is, What is a total loss? I admit that the circumstances of cases like the present are generally suspicious. If the voyage be protracted, deterioration necessarily takes place; and it becomes the interest of the captain and mariners to turn the injury into a total loss. But this is matter for the consideration of the jury. We ought, indeed, to look at the case with some suspicion, where there is so much temptation to throw the cargo overboard. But here it is found that the necessity of so doing arose from sea-water shipped during the course of the voyage; and that the commodity was in such a state that it could not be suffered to remain on board consistently with the health of the crew. In consequence of this necessity, therefore, the commodity was annihilated, by being thrown overboard. Had it not been so annihilated, it would have been annihilated by putrefaction: and is it not as much lost to the assured by being thrown overboard, as if the captain had waited until it had arrived at complete putrefaction? The case of *Cocking* v. *Fraser* was the only thing which raised any doubt in my mind; and it is certainly a very strong case. But the authority of that case is much shaken by the observation of Lord *Kenyon* upon it, in *Burnett* v. *Kensing-*

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ton. I suspect that the words "of no value," applied to the cargo in the case of *Cocking* v. *Fraser*, are somewhat too large, and that the fact was not that the cargo was in such a situation as to make it impossible to preserve it, but that it was so much damaged as to be no longer valuable to the owners, because it was not worth carrying to the port of destination. Lord *Kenyon*, speaking of *Cocking* v. *Fraser*, says, that he cannot subscribe to the opinion there given, that "if the commodity specifically remain, the underwriter is discharged" (*a*): I think myself therefore at liberty to consider the case of *Cocking* v. *Fraser*, as something less strong than it appears to be. The question then is, Whether the loss which has happened be not as much a total loss as if the waves had carried the cargo overboard, or as if it had been directly prevented from arriving at the port of destination, by some of the perils insured against? I never have understood that the underwriters insure fish against no perils which do not end in a total annihilation of the commodity. When the loss arises from capture, the commodity remains in existence in the hands of the enemy; and yet this loss is as much within the policy as a loss arising from the wreck of the ship. I must now take it, that the circumstances under which the cargo in this case stood, were such that sea-damage had so operated as to make it impossible for the captain to keep it any longer on board. Whether the cause of the loss were direct or indirect, it produced a total annihilation of the commodity.

HEATH, J. On looking over this case, it appears to me, that it is not so strongly stated on the part of the assured as the facts would have warranted; for it is not said that the cargo was necessarily thrown overboard. Now it is clear that it was necessary the ship should be repaired, and that the *Portuguese* government would not suffer it to be landed; yet the ship could not be repaired unless the cargo was removed. The evidence, therefore, appears to me to warrant the conclusion that the cargo was necessarily thrown overboard. On this ground I have no difficulty in concurring in opinion with my Lord, that the case does not fall within the exception of the memorandum, and is not governed by the case of *Cocking* v. *Fraser*. Had we thought it the same in circumstances as *Cocking* v. *Fraser*, it would have been necessary

(*a*) See *Marshall*, p. 144.

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1803.

Dyson and Others, v. Rowcroft.

for us to consider how far that case has been impeached by the subsequent observations of Lord *Kenyon* in *Burnett* v. *Kensington*.

Rooke, J. We must now take it from the facts stated in this case, that the cargo was so deteriorated as to make it necessary that it should be thrown overboard. The loss therefore was total; the voyage was defeated, the ship was unable to proceed, and the government of the island would not suffer the cargo to be landed. The injury was occasioned by tempestuous weather; the loss was total, and therefore I think the Plaintiff entitled to recover.—

Chambre, J. The case is not stated so strongly as the evidence seems to warrant. It is said that the cargo stunk so much that the government of the country prohibited its being landed; but it might have been stated that it was inconsistent with the health of the crew that it should remain on board, or that it was necessarily thrown overboard. The ship is expressed to have been so much damaged that she could not proceed, but was sold; now this must certainly have made a complete end of the voyage. We do not construe special cases so strictly as we do special verdicts; on the whole, therefore, it seems to me that the loss was total; and though the cargo might be said to exist in specie, yet in value it did not exist at all. If that be so, the inference of law is plain. What is it against which the underwriters protect themselves, by the memorandum? against partial damage. For what reason? because as the commodities enumerated are perishable in their nature, it might be impossible to ascertain, with exactness, what part of the loss arose from the nature of the commodity, and what from sea-damage. If ever there was a case of total loss, it certainly is the present.

Lord Alvanley, Ch. J. then observed, that the Court considered the case, as stating, that the cargo was necessarily thrown overboard.

Judgment for the Plaintiff.

LEATHAM and Others, Executors of LEATHAM, v. TERRY. June 29th.

A. having effected one policy on ship and another on freight, and the ship having been detained by embargo in *Russia*, he abandoned the ship to the underwriters on ship, and the freight to the underwriters on freight, at the same time receiving an authority from the underwriters on the ship, to act for them, and endeavour to recover it. The ship having afterwards brought home the cargo which was on board at the time of the detention, and earned freight accordingly which *A.* received; held, that in an action by the underwriters on freight against *A.* they were entitled to recover the freight so received by him.

THIS was an action for money had and received, which came on to be tried before Lord *Alvanley*, Ch. J. at the sittings after last *Hilary* Term, when the jury found a verdict for the Plaintiffs, damages 100*l.* subject to the opinion of the Court on the following case:

On the 29th of *October* 1800, the Defendants, being part-owners of the ship *Manchester*, on behalf of themselves and the other owners, effected a policy of insurance on the freight of the said ship, at and from *St. Petersburgh* to the ship's port of discharge, between *Peterhead* and the *Downs*, with liberty to the assured to value the same; but no valuation was at any time made, nor was any other insurance effected on the freight. The policy was for 500*l.* and the Plaintiffs' testator subscribed it for 100*l.* The Defendants had previously insured the ship for 3000*l.* at which sum she was valued in the policies at and from *Hull* to *Petersburgh*; and at and from thence back to any port between the *Frith of Forth* and the *Downs*. The ship sailed from *Hull*, and arrived at *St. Petersburgh* in safety, and having engaged a full cargo, upon freight, for the voyage from thence to *Hull*, had taken in or received on board nearly the whole thereof, when she was detained by the *Russian* embargo, and the cargo taken out. On the 23d *February* 1801, the Defendants abandoned to the underwriters on the ship, all their right and interest in the policies on the ship; and on the 11th *March* 1801, they abandoned to the Plaintiffs' testator, and the other underwriters on the freight, all their right and title to such freight. These abandonments were accepted by the underwriters, and adjustments were signed on the policies. That upon the ship was as follows:—"Adjusted a total loss of 100*l.* *per cent.* "on this policy, and hereby order *Richard Terry* and Son (the "Defendants) to debit our accounts for our respective subscriptions "at that rate, which we agree to pay in good bills on *London*, not "exceeding two months' date from the 1st day of *April* 1801; "the within-mentioned ship having been arrested and detained in "*Russia*, by order of the *Russian* government; the assured hereby

 "undertaking

1803. LEATHAM v. TERRY.

"undertaking, upon the payment of such loss, to assign over all their "right and interest in this policy to Sir *Christopher Sykes*, Bart. "and *Robert C. Broadley*, Esquire, in such manner as the com-"mittee for adjusting this loss may direct. 23d *February*, 1801." The adjustment upon the freight was as follows:—"Adjusted a "loss of 100*l.* *per cent.* payable in one month, the assured "agreeing to assign over all their right and title to all future be-"nefit that may accrue hereafter, except as insurers therein. *Lon-"don*, 11th *March* 1801, 100*l.* *per cent.*" On the payment of the bills given by the underwriters, upon the policies on the ship, the Defendants received from the committee of underwriters on the ship, at *Hull*, the following letter or authority: "Messrs. "*Richard Terry* and Son, *Hull*, 9th *June* 1801. On behalf of "the underwriters on the following ships (mentioning several, "and including the *Manchester*), we request you will give orders "to your correspondents at *Riga* and *Petersburgh*, to act for our "interest in the best manner in their power, and in all respects as "they would have acted for your interest, had no change of pro-"perty taken place; you will please also to accept any bills which "may be drawn for the out-fit of the ships, or any other necessary "charges, insuring the amount of the said charges, and we will be "answerable to you for the same. We are, &c." The Defendants acted as agents for the underwriters on the ship, and paid the several sums of money under-mentioned, on account of the said ship, viz.

Expences at *Cronstadt*, - - - -	106	16	0
Elsineur, - - - - - - -	15	3	7
Hull, - - - - - - -	61	4	2¼
Primage and Buoyage, - - -	8	16	7¼
Portage Bill, - - - - - -	207	12	10½
Travelling expences for crew in *Russia*, -	62	10	0
Brokerage bills on *London*, - - - -	0	6	0
Insurance on 125*l.* expences, - -	3	4	9
Dock dues, - - - - -	17	5	0
	£.482	19	0½

The embargo on the vessels detained in the ports of *Russia* being taken off, the said ship *Manchester* took on board again the same goods, as had been so shipped and unladen at *Petersburgh*, and

 proceeded

proceeded therewith on her voyage from *Petersburgh*, arrived in safety at *Hull*, and there delivered her cargo agreeably to the bills of lading, which had been signed before the embargo, and earned the freight on that voyage. The freight was received by the Defendants, on account of those beneficially interested therein, and amounted, after deducting brokerage, to the sum of 1327*l.* 18*s*. 1*d*. The Defendants made no assignment of the freight (*eo nomine*) to the underwriters on the ship, nor did they make any assignment of the ship to the said underwriters, otherwise than by the abandonment and the adjustment indorsed on the several policies above-mentioned. The ship, after her arrival at *Hull*, and delivery of her cargo, was put up to sale by the committee of underwriters on the ship, and sold for upwards of 3200*l.*; and thereupon the several underwriters upon the ship, and the Defendants, and the rest of the part-owners by the direction of the said committee, joined in executing a bill of sale of the same ship to the purchaser, and the several underwriters upon the ship, have received from the nett proceeds of such sale, 106*l.* 14*s.* *per cent.* on the amount of their respective subscriptions thereon. The Defendant, before the present action was commenced, received notice from the underwriters on the ship, not to pay over the freight to the underwriters on the freight, but to hold the same for the underwriters on the ship. The question for the opinion of the Court was, Whether the Plaintiffs were entitled to recover?

Bayley, Serjt. for the Plaintiffs. The question in this case turns upon the effect of the abandonment to the underwriters on the ship. If that abandonment leaves the underwriter upon the ship, in the same situation as the owner would have been, the Plaintiffs are entitled to recover; on the other side, however, it must be contended that such abandonment places the underwriter upon ship in a better situation. Had that abandonment never been made, the Plaintiffs would clearly have been entitled to recover from the owners. Upon notice of the detention of the ship at *Petersburgh*, the Plaintiffs who were underwriters on freight, paid as for a total loss, and took an abandonment; after which the ship proceeded on her voyage, and earned her freight; that therefore which was a total loss at the time, afterwards turned out not to be so. The Defendants having received that freight which was the subject of insurance by the Plaintiffs, and of abandonment also to them, are bound

1803.

LEATHAM v. TERRY.

bound to pay it over. It cannot be said that the freight received by the Defendants, was not the freight insured by the Plaintiffs, for it was earned upon the same goods, by the same ship and crew, and under the same bills of lading. The effect of an abandonment is to put the underwriter, to all intents and purposes, in the same situation as the owner. The underwriters on the ship therefore stood in the situation of purchasers, with notice of all the obligations to which the ship was subject; but the abandonment did not invest them with any power to put an end to the voyage, which had been contracted for, or the wages of the seamen, or any other contract, entered into by the owners of the ship respecting the ship. The effect of the abandonment to the underwriter upon the ship, is to give to him the disposal of the body of the ship, when the contracts, to which it is subject, shall have been performed. It is true that as between the assured and the underwriter, if the voyage be obstructed, the former is entitled to consider such obstruction as a total loss, and may abandon; but this right to abandon, cannot interfere with the rights of third persons; for though by the contract of insurance, it is as to the immediate parties to that contract a total loss, yet it is so to the immediate parties only, and any other persons who have not entered into that contract, but have distinct rights attaching to the ship, cannot be deprived of those rights by the fiction of a total loss, while the ship really continues in existence, and arrives at the end of her voyage. For the Defendants, it must be contended, that by the abandonment to the underwriters upon the ship, the ship became completely vested in them at *Petersburgh*; that the voyage being put an end to, they had a right to dismiss the mariners without wages, and to dispose of the ship as they should think proper; but that having employed the ship in bringing home goods from *Petersburgh*, they had a right to all the benefits arising from such a voyage, and were only bound to pay the seamen for their services subsequent to the abandonment. The injustice of considering the voyage as completely put an end to by an abandonment is obvious; for if the ship, instead of being detained at *Petersburgh*, had been captured in the channel on her homeward voyage and abandoned, and afterwards recaptured, the underwriter would enjoy all the profits of the voyage, paying the seamen only for the labour of a few hours.

1 *Best*,

LEATHAM v. TERRY

Best, Serjt. for the Defendants. After an abandonment of the ship to the underwriters upon the ship, they are entitled to every advantage arising from the use of the ship. It has been argued, that the abandonee takes the ship, subject to all contracts entered into by the owner, with reference to the voyage; but no authority has been cited in support of that doctrine. In cases of real property indeed, there may be contracts so connected with the enjoyment of the property itself, as to pass to the assignee; but the contracts entered into by the owner with respect to the voyage, are mere personal contracts, and the underwriter, after abandonment, takes the ship as his own without reference to the personal contracts of the owner. The contract of the underwriter is, that he will pay 100*l.* if the ship do not arrive at the end of the voyage; the owner contracts with the freighter for the carriage of his goods, and if the owner omit to carry after the expiration of an embargo, he is liable to an action for special damage. But the underwriter is not liable to the performance of his contract; if he were, instead of paying 100*l.*, he might be obliged to pay 300*l.* To ascertain which set of underwriters ought to receive the freight, it is sufficient to consider which of the two has earned it. The voyage was at the risk and expence of the underwriters upon the ship, and if the ship had been lost, they alone would have sustained that loss. Suppose the ship had been hypothecated in *England*, then if the argument be just, that all contracts by the owners of the ship respecting the ship, affect the ship under all circumstances, after the underwriters on the ship had brought her home at their expence and risk, the person to whom the ship was hypothecated might have claimed her as his own, and the underwriters upon freight, also claiming the freight earned under the abandonment to them, the underwriters upon the ship would have paid as for a total loss, would have incurred further expence in bringing home what was abandoned to them, and yet would have been the only persons reaping nothing from their risk and expence. It can hardly be contended that all disadvantages are thrown upon the underwriter of the ship, by the abandonment of the ship to him, without also giving him a right to all the advantages. And if all the advantages are abandoned to the underwriter of the ship, the subsequent abandonment to the underwriter on freight can make no difference;

1803. LEATHAM v. TERRY.

difference; it is a mere nullity. If the freight had never been insured, there is no doubt that the underwriter on the ship might have recovered it from the owner; and as the underwriter on freight claims under the owner, he cannot stand in a better condition than him.

Bayley, Serjt. in reply, observed, that if the underwriter on freight was entitled to claim the freight, he was also liable to his share of expence in bringing the cargo home; and consequently the arguments arising from the hardship supposed to attach on the underwriter upon ship, were not well founded.

Cur. adv. vult.

On this day Lord ALVANLEY, Ch. J. said, We have inquired into the circumstances of the case (*a*) lately decided in the King's Bench upon the same subject, and find they do not materially differ from the present. Here the assured, in consideration of being paid for a total loss upon the ship, agreed to assign over all their right and interest in the policy upon the ship; after which they agreed with the underwriters on the freight, in consideration of being paid a total loss for the freight, to assign over to the underwriter son the freight "all their right and title to all future benefit that might occur thereafter, except as insurers therein." By this last adjustment therefore, they agreed to assign over all their future interest to arise on the freight. The ship having returned and earned freight, the Defendants, the assured, received the whole as if they had never abandoned; and the question now is, Whether, in an action for money had and received, the underwriters on freight are not entitled to demand what the assured have received? The Court of King's Bench, in deciding the case before them, were of opinion, that the assured had bound themselves to account to the underwriters on the freight, for all the freight they might receive; but in giving judgment they expressly declared, that they did not intend to decide the question between the underwriters on the ship and the underwriters on the freight. We shall take the same course, and though the case has been argued as if it were a question between the two sets of underwriters, we desire not to be understood as giving an opinion upon such a case. We only determine that the Defendants have made themselves responsible to the

(*a*) *Thompson* v. *Rowcroft*, 4 *East*. 34.

the Plaintiffs in this form of action, for the freight which they have received (*a*).

Per Curiam, Postea to the Plaintiffs.

(*a*) At the same time it was intimated by the Court, and agreed by the Plaintiffs, that they were to contribute proportionably to the expence of bringing the cargo home.

HOUGHTON and Another, Assignees of JACKSON, a Bankrupt *v.* MATTHEWS and Another.

June 29th.

A. a factor, having sold goods of *B.* in his own name to *C.*, the latter, without paying for these goods, sent another parcel of goods to *A.* to sell for him, never having employed *A.* as a factor before. *C.* then became bankrupt, and his assignees claimed the goods sent by him to *A.* and which still remained unsold, tendering the charges upon those goods. *A.* refused to deliver them up, claiming a lien upon them for the price of the former goods sold by him to *C.*, there being a balance then due from *B.* to himself. Held that the assignees were entitled to recover.

TROVER for a quantity of indigo.

This cause was tried before Mr. Justice *Rooke*, at the last *Lent* assizes at *Lancaster*, when the following facts appeared in evidence: The Defendants, who were brokers, had, on the 3d of *September*, 1799, sold a parcel of logwood and fustic to *Jackson*, the bankrupt, and on the 11th of the same month, a parcel of indigo, neither of which parcels were paid for at the time of *Jackson*'s bankruptcy. The logwood and fustic was the property of a person of the name of *Greatham*, and the indigo of a person of the name of *Dixon*; both these parcels had been put into the hands of the Defendants by the proprietors, to be sold by them as brokers, and both sales were effected in the names of the brokers only, it being their practice to sell in their own name, where the party for whom they sold was indebted to them. At the time of such sales, and when this action was commenced, there was a balance due both from *Greatham* and from *Dixon* to the Defendants (*a*). Soon after the above sales, *Jackson*, the bankrupt, put into the hands of the Defendants, the indigo in question, to sell, as brokers; no advance being made by them upon the indigo, nor any debt existing between the Defendants and *Jackson*, other than what was due to the former for the goods of *Greatham* and *Dixon*, purchased by *Jackson* of the Defendants as before mentioned. Indeed the commission to sell the indigo in question, was the first time the latter had ever employed the Defendants as brokers. While the indigo in question still remained unsold in the hands of the Defendants, as brokers, *Jackson* became a bankrupt. Upon this the Plaintiffs, as his assignees, demanded the indigo, and tendered payment of any charges which might have

(*a*) This fact was only proved by the Defendants' clerk, speaking to his recollection of the state of the account in the Defendants' books.

 been

1803.
HOUGHTON and Another v. MATTHEWS and Another.

been incurred in respect of that article; the Defendants refused to deliver it up, claiming a lien upon it for the debt due from the bankrupt, in consequence of the goods of *Greatham* and *Dixon* sold to him, and which still remained unpaid for. The learned Judge was of opinion that the Defendants had no lien upon the goods in question, and therefore, under his direction, a verdict was found for the Plaintiffs, with leave reserved to the Defendants to move to set that verdict aside, and have a non-suit entered.

Accordingly a rule *Nisi* having been obtained in last *Easter* Term,

Lens, Serjt. now shewed cause. The question is, Whether, because the Defendants, as brokers to two persons of the names of *Greatham* and *Dixon*, formerly sold goods to the bankrupt *Jackson*, for which their principals *Greatham* and *Dixon* have not been paid by the bankrupt, they, the Defendants, have a right to detain the goods in dispute, which were put into their hands as brokers by the bankrupt, and to pay *Greatham* and *Dixon* out of the proceeds thereof? To entitle the Defendants to this lien which they claim, they must either shew that the bankrupt is indebted to them personally upon a general balance of accounts, or that they have advanced money upon the particular goods which they refuse to deliver up. It appears, however, that no money was advanced upon the goods, and as this was the first instance in which the Defendants were employed by the bankrupt as his brokers, there could be no balance in their favour. In fact, *Greatham* and *Dixon* now endeavour to obtain a lien upon the goods through the intervention of the Defendants, and thus to pay themselves the debt owing to them from the bankrupt. Had the Defendants sold for *Greatham* and *Dixon* under a *del credere* commission, they would have been personally liable to their principals, and therefore might have considered the goods as their own, and have claimed all the rights of principals arising therefrom. But the Defendants, though they sold in their own name, still were not responsible to their principal for the proceeds of what they sold, and therefore the parties to whom they sold, became debtors to the persons for whom they sold. The mode in which the Defendants, for their own convenience, made out their sale accounts, cannot invest them with any rights which do not result from the nature of the transaction itself. The

estate of the bankrupt will remain indebted to *Greatham* and *Dixon*, but there is no liability under which the Defendants can be called upon to pay that debt. In *Grove* v. *Dubois*, 1 *T. R.* 112, it was held that a broker, with a *del credere* commission, might set-off to the same extent as a principal; but there the Court expressly take the distinction of his being a broker acting under a *del credere* commission. The same principle was recognised in *George* v. *Clagett*, 7 *T. R.* 359; and indeed there the decision of the Court was not in favour of the broker, for it only gave a purchaser under him as such broker a set-off against his principal.

Heywood, Serjt. *contrà*. It is supposed, for the sake of the argument, that a broker selling for a third person has no more property in the goods than a mere stranger, whereas by the deposit of the goods in his hands he acquires a special property in them. Now in *Kruger* v. *Wilcox*, *Ambl.* 253, Lord *Hardwicke* says, in cases of bankruptcy, "if any person has a specific lien or a specific property in goods, which is clear and plain, it shall be reserved to him notwithstanding the bankruptcy." The goods sold to the bankrupt were not sold as the goods of *Greatham* and *Dixon*, but in the name of the Defendants; that circumstance was of itself sufficient notice to the bankrupt, that the Defendants meant to claim a lien upon the goods subsequently put into their hands by him. The case of *Gonsalez* v. *Sladen*, *Bull. N. P.* 130. 2d. edit. clearly proves that the broker may maintain an action in his own name against the vendee of the goods. It is contended indeed, that none but brokers acting under a *del credere* commission can claim this lien which the Defendants insist upon; but it should be remembered, that the very ground upon which lien is allowed is to protect the broker from loss; and that a broker who advances money to his employers upon the confidence resulting from his rights as a broker, has at least as good a claim to a lien as he who acting under a *del credere* commission, only makes himself liable to his principal for any possible losses which may occur. Now in this case the Defendants had advanced money to *Greatham* and *Dixon*, for both these persons were indebted to them on the balance of accounts, both at the time of the sale and the detainer of the goods in question, though it is true that they did not specifically advance money in respect of the goods sold by them to the bankrupt. In *Atkins* and another v. *Amber*, 2 *Esp. N. P. Cas.* p. 493, it was holden that brokers not selling

1803.
Houghton and Another v. Matthews and Another.

under a *del credere* commission might maintain an action against the vendee for the price of the goods sold, the principal being at that time in their debt for money advanced upon those goods; and Lord Ch. J. *Eyre* was of opinion, that it was no objection to the recovery by the brokers, that the declaration stated the contract to have been made with them, whereas the sale-note stated that the goods were sold on account of the principal. And in *Drinkwater* v. *Goodwin*, *Cowp.* 251, Lord *Mansfield* says, "We think a factor who receives clothes, and is authorised to sell them in his own name, but makes the buyer debtor to himself, though he is not answerable for the debts, yet he has a right to receive the money. His receipt is a discharge to the buyer, and he has a right to bring an action against him to compel the payment."

Cur. adv. vult.

There being a difference of opinion upon the Bench, the learned Judges now delivered their opinions *seriatim*.

Chambre, J. The question is, Whether when a broker receives goods to sell for *A.* he is entitled to retain them though unsold, after a tender of all charges due in respect of those goods, on the ground of a lien for the price of other goods sold by him for *B.* to *A.* under a general authority from *B.* to sell, there being no general balance due from *A.* to the broker, and the broker not having sold the goods of *B.* under a *del credere* commission? I state the question thus, because I conceive that, in the present case, the mere act of the bankrupt buying goods of the Defendant did not constitute the relation of principal and factor between them. The demand of the Defendant upon the first goods did not arise out of any course of dealing in the relation of principal and factor, but was as foreign to that relation as if it had arisen upon a legacy, or any other species of debt the most remote from that course of dealing. I do not find any authority for saying, that a factor has any general lien in respect of debts which arise prior to the time at which his character of factor commences: and if a right to such a lien is not established by express authority, it does not appear to me to fall within the general principle upon which the liens of factors have been allowed. It seems to me that the liens of factors have been allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors; but debts which are incur-

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red prior to the existence of the relation of principal and factor, are not contracted upon this principle. And if the lien now contended for were allowed, instead of inducing persons to place goods in the hands of factors, it would operate the contrary way, since it would tend to prevent insolvent persons from employing their creditors as factors, lest the goods entrusted to them should be retained in satisfaction of former debts. If this were the only point in this case, I should be of opinion that the Defendants were not entitled to retain: But laying this point out of the question, I still think the debts due from the bankrupt, in respect of the goods sold to him, are not to be considered as due to the Defendants, so as to authorize them to set-off such debts, in an action brought against them by the bankrupt's assignees, and that the Defendants have no property or interest whatever in those debts. I never yet heard of a person being allowed to protect himself, by setting up debts in reality due to other persons; or that a factor, having no demand on his principal, could, by transactions with a third person, create a new interest in himself. In the case of *Drinkwater* v. *Goodwin*, Lord *Mansfield* says, "it shall not be in the power of any man, by his election, to vary the rights of two other contending parties." According to this rule, the factor has no right to prejudice the title of his principal. That a factor has a lien for his general balance, is a point too well established to be disputed. The case *Kruger* v. *Wilcox* proves nothing more. Where a factor is in advance for goods by actual payment, or where he sells under a *del credere* commission, whereby he becomes responsible for the price, there is as little doubt that he has a lien on the price, though he has parted with the possession of the goods. If he acts under a *del credere* commission, he is to be considered as between himself and the vendee, as the sole owner of the goods. There is no doubt of the authority of a factor to sell upon credit, though not particularly authorised by the terms of his commission so to do; but if he so sell without a *del credere* commission, it is well established that he does not become a surety; the debt is due to the owner of the goods only. Many cases have been cited, which do not appear to me to warrant the inferences drawn from them. In *Gonzalez* v. *Sladen* it is said, that if the factor of a person beyond sea buy or sell goods, he may sue or be sued in his own name; for if he buy, the credit is presumed to be given to him; and if he sell, the pro-

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1803.
HOUGHTON and Another v. MATTHEWS and Another.

mise is presumed to be made to him. But where the principal resides abroad, he is presumed to be ignorant of the circumstances of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties. The sentence in *Buller*'s *nisi prius*, immediately following the case of *Gonsales* v. *Sladen*, was not cited. There it is said, that "a factor's sale does, by the general rule of law, create a contract between the owner and buyer; and therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him, and not the factor, the buyer would not be justified in afterwards paying the factor." The factor therefore has no right to consider himself as substantially the creditor of the vendee of the goods; he has no equity in his favour, and the account is really and truly between the vendee and the principal. It is true that Mr. J. *Buller* adds, "yet perhaps, under some particular circumstances, this rule may not take place, as where the factor sells the goods at his own risk (*i. e.* is answerable to the owner for the price, though it be never paid), for in such case he is the debtor to the owner, and not the buyer." Neither the case of *Rabone* v. *Williams*, nor that of *George* v. *Clagett*, appear to me to have any application to the present. The principle upon which those cases proceeded, is well summed up in *Cullen*'s bankrupt laws (a), *viz.* that where a party being only an agent, acts ostensibly as the real and sole owner, (as in the case of a factor concealing his principal, or an acting partner his partners), the buyer of goods from him may, in an action by the principal in the one case, or the firm in the other, set-off a debt due to him from the factor or acting partner respectively, upon the ground that the parties by their conduct, having enabled their agent to gain credit as the sole owner, and the buyer having *bonâ fide* contracted with him in that character, they cannot recover against the buyer, without allowing him the same advantages and equities in his defence that he would have had against their agent. There is a case of *Garrett* v. *Cullum*, *Bull. N. P.* p. 42. last *Ed.* and which is also cited in *Scott* v. *Surman*, *Willes*, 405. which fully proves the doctrine that the debt of the vendee is not due to the factor. In that case the factor of a person living in *Ireland*, having sold goods to a person living in *London*, without acquainting him with the name of his principal, or acquainting his principal with the name of his vendee, became bank-

(a) P. 206. n. 71.

rupt;

rupt; after which the vendee paid the money to his assignees; the principal then brought an action against the assignees and recovered, it being held that though the vendee was discharged by the payment to the assignees, yet the debt was not in law due to them but to the principal, and therefore did not pass under the assignment. That case is said in *Willes*, to have been cited at *Guildhall*, by Lord Ch. J. *Parker*, with approbation. These cases appear to me to establish, that where a factor has no special claim on the goods, and he has disposed of them, whereby he has lost the advantage arising from possession, the debt is to be considered to all intents as the debt of the principal, and the factor has no lien on the price. My brother *Heywood* mainly relied upon the case of *Drinkwater* v. *Goodwin*, whereas the Court throughout that case evidently proceed on the ground of the factor having given his security for the payment of the goods, and thereby acquired a lien on them in the same way as if he had advanced his money on the goods themselves. The principle upon which that case was decided is very correct; but why did the decision proceed upon that principle, unless with a view to distinguish it from cases circumstanced like that now before the Court? It is unnecessary to enter at large into all the positions on this subject, which are laid down in the books; many of which are very clearly stated in *Scott* v. *Surman*. It has been observed, that though a broker does not act under a *del credere* commission, still he may bring an action in his own name for goods sold by him. This power, however, is incident to the nature of his employment, as also that he should be able to give discharges to those from whom he receives money in payment of goods sold on account of the persons for whom he acts. But these circumstances do not prove that he has any interest in the goods which pass through his hands. How would this case have stood, if the Defendants had never become creditors of *Greatham* and *Dixon*? It has not been argued, that in such case there could have been any lien; and yet how can any right between the Defendants and the bankrupt be altered by a subsequent course of dealing between the Defendants and third persons? The rights of lien and detention must have existed at the time when the goods of *Greatham* and *Dixon* were sold to the bankrupt, and cannot be varied by the subsequent conduct of *Greatham* and *Dixon* towards the Defendants, unless the bankrupt has been privy to their transac-

 tions.

1803.

HOUGHTON and Another v. MATTHEWS and Another.

tions. Under all these circumstances, and finding no authority which warrants the factor in claiming any such lien as is claimed in this case, I must deliver my opinion that the Defendants have failed in the defence set up by them, and that as they were fully satisfied all they had a right to demand, the learned Judge was perfectly correct in his direction to the jury.

ROOKE, J. This question arises in an action of trover, and must be decided by the rules of law. Cases which have been decided by the Lord Chancellor, on the principles of general equity at the hearing of bankrupts' petitions, must not give the rules for our decision in the courts of law. Lord *Hardwicke* very cautiously takes the distinction in two cases, namely, *Kruger* v. *Wilcox*, *Ambl.* 253. and *Ex parte Deeze*, 1 *Atk.* 228. In the first of these cases he says, "whether this was ever allowed in trover at law, where the goods were turned into money, I cannot say, nor can I find any such case. I have no doubt it would be so in this Court if the goods remained in specie, nor do I doubt of its being so where they are turned into money." In the latter case he says, "and here, though there had been no bankruptcy in an action for these goods, the debt could not have been set-off; yet as the clause of mutual credit has been extended, I think it may come within that rule." In the case before the Court, there is no doubt that the Defendants had a lien on the goods sent to them by *Dixon* and by *Greatham*, for their general balance while the goods remained in their hands, and if they had received the money for these goods, they might have retained it for the balance due to them. But when they parted with the goods they parted with their lien; and if they were at that time creditors of *Dixon* and of *Greatham*, (which was not directly proved at the trial) they were on the same footing as the other creditors. Having then a claim on the general effects of *Dixon* and *Greatham*, *Jackson*, to whom they had sold some of their goods, sends them goods to sell, and while these goods remained unsold, becomes bankrupt; the Defendants claim to retain these goods for a debt due to *Dixon* and to *Greatham*; because if *Jackson*, instead of sending goods to them as factors, to sell for him on his own account, had sent them money to pay for the goods he bought of them, they might have retained the money for debts due to them from the house of *Dixon* or of *Greatham*. The

doctrine

doctrine of liens has already been carried very far, but I cannot find that it has yet been carried so far as to permit a factor to retain for all possible demands which he may choose to make on the goods sent to him. Here the Defendants are supposed to have a demand and a right of action against *Dixon* and against *Greatham*, who, for aught we know, are each of them solvent. The Defendants are not answerable to them for the value of the goods sold to the bankrupt, nor have they advanced any money on them. The bankrupt is indebted to the house of *Dixon* and of *Greatham*, for the price of the goods sold to him on their account by the Defendants. The Defendants then are middle men, not answerable to *Dixon* or to *Greatham*, and have no claim upon the bankrupt in their own right except for the expences due on the goods he has sent to them, which expences have been tendered to them. I doubt (but with great deference to my L. Ch. Justice who has had so much experience in Courts of Equity) how far equity would assist such a claim, since it is not necessary to secure the factors themselves, but is set up only for the benefit of other persons. I question whether the creditors at large of the bankrupt *Jackson*, have not an equitable as well as legal claim, equally well founded with that of *Dixon* and of *Greatham*. This is an attempt, through the means of these Defendants, to give the houses of *Dixon* and of *Greatham* a preference above the other creditors. The assignees have made out their case as Plaintiffs; the Defendants set up this lien by way of defence: it is incumbent on them to make out a clear case; they are not entitled to have presumptions made in their favour; and the Court can only judge from the facts actually proved by them. On the whole I am satisfied that at law, and in this action of trover the Defendants cannot support this claim of a lien. My opinion therefore is, that the rule for a new trial should be discharged.

HEATH, J. I am of the same opinion with my brothers *Rooke* and *Chambre*, who have so fully discussed the principles and authorities relating to the subject that it is unnecessary for me to enter into the matter at length. The Defendants claim a right to retain the goods in question as brokers, not in respect of any debt due to themselves upon the goods, but in respect of a debt which they say is due from the bankrupt to them, but which, in truth, is due to *Greatham* and to *Dixon*. That part of the case has been very satis-

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1803.

HOUGHTON and Another v. MATTHEWS and Another.

factorily argued by my two brothers who preceded me. There are two species of liens known to the law, namely particular liens and general liens. Particular liens are where persons claim a right to retain goods in respect of labour or money expended upon them; and those liens are favoured in law. General liens are claimed in respect of a general balance of account; and these are founded in custom only, and are therefore to be taken strictly. There is no authority to shew that such custom has ever been extended to debts generally; and the opinion of Lord *Hardwicke* in *Ex parte Deeze*, which is one of the first cases in which a party was allowed to retain for a general balance, seems directly to the contrary. From the report of that case in 1 *Atk.* 229, it appears as if the decision had been founded on the 2 *Geo.* 2. respecting mutual credits; but that report is not correct; for in *Ex parte Ockenden*, 1 *Atk.* 237, Lord *Hardwicke*, speaking of the case *Ex parte Deeze*, says "there was evidence that it was usual for packers to lend money to clothiers, and the clothes to be a pledge not only for the work done in packing, but for the loan of money likewise." In that case, therefore, a right was claimed to retain for a general balance of accounts, *Deeze* having been a creditor of the bankrupt for money advanced to him as a packer and merchant, antecedent to the time of the particular goods being put into his hands. From the expression of Lord *Hardwicke* also, 1 *Atk.* 229, these goods were in the petitioner's hands as a pledge for some part of his debt, namely, the price of the packing; "and what right has a Court of Equity to say, that if he has another debt due to him from the same person, the goods shall be taken from him without having the whole paid?" we may collect that he did not think the petitioner entitled to retain for the whole, independent of the custom. The case of *Drinkwater* v. *Goodwin*, proceeded on a special agreement independent of the custom. The agreement was stated and relied on; and Lord *Mansfield* says, "the agreement therefore is, that he shall have a lien." There is no authority therefore for the position, that a factor may retain goods in his hands in respect of all debts whatsoever; and there is a rule of law which has not been touched upon in argument, and which appears to me decisive of the contrary, namely, that nothing can fall within the custom of trade but what concerns trade. Collateral obligations therefore, such as

money due for rent, are not within the custom which authorises a factor to retain for a general balance.

Lord ALVANLEY, Ch. J. When this motion was first made, I inclined to think my brother *Rooke*'s direction proper; but having heard the argument and looked further into the question, I find myself under the necessity of differing from my brothers so far, as to think that a verdict ought not to be entered for the Plaintiff on the facts stated in the report. Farther than that however I do not go. I am by no means prepared to say, that a verdict ought to be entered for the Defendant; for I think that if a new trial were granted, some facts might be established which are now equivocal, and which would give rise to a question of so much importance, that I should wish to take more time for consideration before I decided against the Defendants' right to a lien. It was not distinctly proved at the trial, that *Greatham* and *Dixon* were indebted to the Defendants, but we must suppose that fact capable of proof. If, however, the fact itself would make no difference in the determination of the Court, there is no reason for sending the case to a new trial in order to have it found. At present, therefore, I must suppose that the case affords sufficient ground to infer that *Greatham* and *Dixon* were indebted to the Defendants. These persons then having put goods into the hands of the Defendants, with authority to sell them in their own names, and consequently to bring actions and give receipts for the money; and the Defendants having accordingly executed their commission by selling in their own names, and *Greatham* and *Dixon* being still in their debt, the Defendants acquired a right to demand the value of the goods from the persons to whom they were sold. The cases cited have, I think, decisively proved that point. Nor does it make any difference, whether the goods were sold under a *del credere* commission or not. The only effect of a *del credere* commission, is to make the factor responsible for the value of the goods to his principal. If the factor, without such a commission, sell the goods in his own name, he may bring an action for the value; and if the principal bring the action, the vendee may set-off a debt due to him from the factor. The factor, therefore, being authorised to bring an action for the value of the goods, may retain the whole amount in satisfaction of the debt due to him from his principal. We are to consider then, in the first place, what relation was created between

1803.
HOUGHTON and Another v. MATTHEWS and Another.

these parties, by those circumstances which took place subsequent to the sale of the goods belonging to *Greatham* and *Dixon*; remembering that at the time of that sale, the Defendants were the factors of *Greatham* and *Dixon* only, and not of the bankrupt. That subsequent to that period, and while the bankrupt still remained indebted for the goods of *Greatham* and *Dixon*, which he had received from the Defendants, he sends the goods in question to the Defendants to be sold by them as his brokers, knowing that he stood indebted to them for the goods of *Greatham* and *Dixon*, though he did not know but that the Defendants themselves were the proprietors of the goods, the names of *Greatham* and *Dixon* not having been communicated to him. Consequently the bankrupt must have considered his debt as due to the Defendants; and the moment he sent goods to them as brokers, their right of lien attached upon the goods. If the Defendants had sold the goods, it is clear that they might have applied the money arising out of the sale in discharge of the debt due from the bankrupt, on account of the goods of *Greatham* and *Dixon*; and how do we know that they did not forbear to sell, because they considered the goods as a security for that debt? Whatever may be the case with respect to other trades, it is not now denied that a factor has a right to retain for the general balance of his account. If a debt be due from the principal to the factor, antecedent to the time of the particular goods being put into the hands of the latter, he is entitled to retain them as a security. And if a man commence dealing with a factor, to whom he is indebted on bond, I am not prepared to say that the lien of the factor would not attach upon such debt. In the present case, however, the goods of *Greatham* and *Dixon* were sold by the Defendants as factors, and the debt therefore arose in the ordinary course of their dealing as factors. The case of *Drinkwater* v. *Goodwin* was, I admit, the case of a particular contract, but the principle of the decision was, that if a factor become surety for his principal, he has a lien to the amount of the sum for which he becomes surety. The case of *Grove* v. *Dubois* establishes, that a broker acting under a *del credere* commission, may set-off against his principal the amount of losses incurred; and the cases of *George* v. *Clagett*, and *Rabone* v. *Williams* shew, that if a factor sell the goods of his principal in his own name, the buyer may set-off against the principal a debt due from the factor. It appears to me, therefore, that a factor who sells in his own name, stands in the same

situation with respect to lien as if he had a *del credere* commission. 1803.
I do not wish to be bound by my present opinion, but as the case strikes me, the present Defendants are warranted, by the custom of merchants, in claiming a lien upon the goods now sued for. It is contended, that the Defendants only set up this lien with a view to protect *Greatham* and *Dixon*. But I cannot assent to a proposition which assumes that *Greatham* and *Dixon* are solvent. The presumption rather is that they are insolvent, since they have not paid the debt due from them to the Defendants; and the question is, Whether the latter are not justified in retaining the goods in their hands, as a security against the insolvency of their debtors? With respect to the authority of the cases which have been cited from the Court of Chancery, it is true that courts of equity, in administering justice, sometimes go further than the courts of law. But it is clear that the Lord Chancellor has no authority to skreen goods in the hands of a factor, with a view to distribute them in equity according to a different course from that which prevails at law; and if Lord *Hardwicke* had entertained any doubts upon the rule of law, he would certainly have taken the opinion of some common-law court. I can hardly conceive the case *Ex parte Deeze* to be well reported: for, according to the report, Lord *Hardwicke* seems to suppose that in cases of bankruptcy, if a person has a lien to a certain amount, there is no harm in giving him a lien to the whole amount of his claim. But to such a proposition no lawyer can assent. The other ground of determination supposed to have been stated by his Lordship, namely, the clause of mutual credit, certainly cannot be sustained. The decision therefore must rest upon the ground of lien; and in the subsequent case *Ex parte Ockenden*, Lord *Hardwicke* states the real principle upon which the case *Ex parte Deeze* must have proceeded; for he says "in the case *Ex parte Deeze*, there was evidence that it was "usual for packers to retain not only for work done, but for money "lent." These cases were followed by some other determinations in equity, which I do not think it necessary to mention, as there are cases at law. In *Green* v. *Farmer*, 1 *Black.* 652. 4 *Burr.* 2221, Lord *Mansfield* says, "the convenience of commerce and natural "justice are on the side of liens, and therefore of late years Courts "lean that way." He then states, that lien may arise not only from express contract, or where the party has acted as a factor, but

HOUSTRIN and Another v. MATTHEWS and Another.

1803.

Houghton and Another v. Matthews and Another.

but that it may be implied from the usage of trade, or from the manner of dealing between the parties in the particular case. Indeed he considers Lord *Hardwicke* as having decided the case *Ex parte Ockenden* (which at first view seems not so favourable to liens as his opinion in *Ex parte Deeze*) on the special ground that there was no room to imply a lien, from the usage of trade or the particular manner of dealing. The case of *Kruger* v. *Wilcox* had before established, that if there be a course of dealings and general account between a merchant and a factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account; it is considered as an interest in the specific things, and they are made articles in the general account. In that case Lord *Hardwicke* speaks only of a foreign factor, but there is no doubt that a home factor is entitled to the same lien, though the *lex mercatoria* seems to found the origin of the custom on the merchant residing abroad. *Kruger* v. *Wilcox* is recognised in *Foxcroft* v. *Devonshire*, 2 *Bur.* 937, and in *Walker* v. *Birch*, 6 *T. R.* 262. Lord *Kenyon* considers the factor's right to his lien for a general balance as so long settled, that it ought not to be brought into dispute; he says it is an agreement which the law implies. The opinion indeed of Mr. Justice *Lawrence* in that case, may seem to support the opinion of my brothers; for he says, that the doctrine of lien only applies to cases where the goods have been deposited in the nature of a pledge; that the persons for whom the lien was then claimed, never acted as the brokers of their principal before the transaction in question, and consequently that the goods could not be considered as deposited with the former as a general pledge. The question, however, is, Whether a factor be not that sort of person that all goods which come into his hands are to be considered as cloathed with a lien for his general balance? In *Co. Bank. Law.* p. 455, *Ed.* 1797, it is laid down, that where one has acted as factor for another, every thing in his hands is construed to be a pledge not only for incidental charges, but as an item of mutual account for the general balance due to him. The only point in difference between my brothers and myself is, Whether this debt due on account of the goods sold for *Greatham* and *Dixon*, be such a debt as can be brought into a mutual account between the Defendants and the bankrupt? I am not desirous of favouring liens to so great an extent as has been done by the Courts of late; for we know it has been determined, that the members of

any trade may, by agreement among themselves, obtain the benefit of that sort of lien to which a factor is entitled by the general law. I am sorry the Courts have gone so far. In this case, however, I feel that the Defendants are in possession of a principle of law which has never been denied, and that being commissioned by another to sell goods for him, they acquired a right to retain those goods in satisfaction of any demands which might be due to them from the person who sent the goods. The moment the goods were sent, the relation of principal and factor arose; and when that relation commenced, the right to a general lien attached. I desire not to be considered as giving a positive opinion, but my doubts incline me to think that the Court is justified in entering a verdict for the Plaintiffs.

Rule discharged.

(IN THE HOUSE OF LORDS.)

LOTHIAN and Others *v.* HENDERSON, RIDDELL and Others.

July 14th.

Policy of insurance on board the *Catherine*, an *American* vessel. After the policy was effected, doubts having arisen whether the policy contained a warranty, the underwriters signed an agreement, that in case of capture or seizure, the assured, before they claimed for a loss, must produce proofs of the ship being *American* bottom, and by bills of lading shew that the cargo had been shipped on account and risk of *A. B.*, upon which they would settle by granting bills at four months for the amount of their subscriptions; in full dependence that the insured would use their best endeavours to recover the property as for account of the shippers. Held that on proof being produced that the ship was *American* bottom, and the cargo shewn by bills of lading to have been shipped on account and risk of *A. B.*, the assured were entitled to recover, on a loss by capture, notwithstanding the production by the underwriters of any *French* sentence of condemnation to satisfy the warranty.

A sentence of condemnation in a *French* Court of Admiralty is admissible evidence in an action here between the assured and underwriters of a policy of insurance containing a warranty of neutrality.

It seems that the sentence of a foreign Court of Admiralty condemning a ship warranted neutral, in which the consideration leading to the judgment proceeded on the want of a document not required by the law of nations, but which adjudges "lawful prize all the goods and effects which compose the cargo of the said ship, since the whole, owing to the Captain not being provided with proper and regular dispatches and papers, is to be deemed the property of the enemies of the French Republic," is conclusive evidence against the warranty of neutrality.

IN *April* 1797, the Respondents, as agents of Messrs. *Henderson*, *Ferguson*, and *Gibson*, of *Virginia*, subjects of the United States of *America*, insured the cargo of the ship *Catherine*, bound from *America* to *Holland*, at ten guineas *per cent.*: the policy, which was underwritten by the Appellants, was upon the goods and merchandizes of and in the good ship called the *Catherine*, an *American* vessel. Soon after the signing of the policy, one of the underwriters having asked, Whether a warranty was implied by the words "*American* vessel"? the Respondents answered, That

they

1803.

LOTHIAN and Others, v. HENDERSON and Others.

they meant no more than to describe the vessel as they found it in the instructions of their correspondents; and that the meaning of this part of the policy and the understanding of the parties might be ascertained with precision, an agreement in the following terms was proposed by the brokers, and signed by all the underwriters:

"*Glasgow*, 20th of *April* 1797.

"Whereas doubts have arisen how far, by the insurances underwritten by us on tobacco for Messrs. *Henderson*, *Ferguson*, and *Gibson*, by the *Catherine*, there is a warranty of property, and what is to be understood by such a warranty; it is hereby declared, that in case of capture or seizure, Messrs. *Henderson*, and Co., before they claim for a loss, must produce proofs of ship being an *American* bottom, and by bills of lading shew that the tobacco shall have been shipped on account and risk of Messrs. *Henderson*, *Ferguson*, and *Gibson*: upon which we shall settle by granting our bills at four months' date for the amount of our subscriptions, deducting the stipulated premium, in full dependence that the insured will use their best endeavour to recover the property as for account of the shippers."

The *Catherine* sailed on the 1st of *April* from *Nottingham* in *Virginia*, and on the 17th of *May* was captured by the *Dugué Trouin*, a *French* privateer, commanded by captain *Dutache*, because she had not on board a *rolle d'equipage*, required by the *French* Executive Directory, and sent into *France*. After a trial in the Tribunal of Commerce in the canton of *Nantz*, the *Catherine* was condemned. Of this the Respondents were informed on the 22d of *August*, by a letter and protest of the ship's master, captain *Cazneau*. Being thus certified of the capture, the Respondents transmitted the captain's protest to their brokers, directing them to lay it before the underwriters, and request them to settle the loss according to agreement. They transmitted at the same time, according to their undertaking, the bill of lading of the *Catherine*, which expressed that the cargo was shipped on account and risk of *Henderson*, *Ferguson*, and *Gibson*, citizens of the United States, and a certificate by the *American* vice-consul at *Nantz*, stating that the ship's papers were lodged in the Tribunal of Commerce of that city. These papers were the only papers which, at the time when the *Catherine* sailed, were furnished or could be furnished to *American* ships; which circumstances the Respondents

offered to prove to the Appellants, the underwriters. The Appellants, however, refusing to pay the loss, the Respondents brought an action in the Court of Admiralty in *Scotland.* To this action the Appellants set up the following defence: That the *Catherine* being called in the policy an *American* vessel, implied a warranty undertaken by the assured of that fact; that this warranty further implied that the ship should be furnished with all documents necessary to prove the neutrality; and that the sentence of the *French* prize court, condemning ship and cargo as enemy's property, was evidence conclusive and not to be redargued, that the warranty had not been complied with, and therefore that the assurers were liberated. The material part of the *French* sentence was as follows: "The Tribunal having maturely weighed the whole matter, without attending to the certificate of property of the ship *Catherine*, bearing date 15th *June* 1791, and a peculiar passport of the 26th *March* 1797, signed "*Washington*," nor to the charter-party of the first of *May* the same year, which proves the said ship *Catherine* to be the property of Citizen *Anthony Davenport* of *Newbury*, citizen of the United States; without attending farther to a manifest, bearing date the 2d of *March* 1797, to which is annexed a certificate of the 26th *March* of the same year, signed by *George Risci*, tax-receiver in the district of *Nottingham* in the State of *Maryland*, stating that the aforesaid ship has been expedited according to law; nor to a bill of lading, dated the 22d of *March* 1797, which proves that the shippers and owners of the 270 hogsheads of tobacco laden on board the *Catherine*, are *Henderson*, *Ferguson*, and *Gibson*, of *Dumfries* in *Virginia*, citizens of the United States; and that the said tobacco was expedited for their account and risk, to the consignment of *Thomas Hoedt*, residing at *Rotterdam*; considering that Captain *Samuel Cazneau* has not produced any muster-roll in due form, signed and attested by public officers appointed for that purpose, but merely a sort of ship's articles without any signature or date, wherein are inserted the names of ten men, said to compose the crew of the ship *Catherine*, without mention being made either of their native place or of their place of abode; and in corroboration of this list, six protections, granted by the United States to persons named *John Cannon*, &c. being part of the ship's crew, and which proves them to be citizens of the United States of *America*, and their having been so for a

certain

1803.

LOTHIAN and Others, v. HENDERSON and Others.

certain number of years; confidering that the 7th article of the law of 13 *Nivose*, 3d year, which abrogated that of the 9th *May* 1793, cannot be recurred to, purfuant to the *arrêt* or refolution of the Executive Directory of the 12th *Ventose* 5th year, and that this law remains in full vigour; confidering that this law of the 9th *May* 1793, old ftyle, orders the ordinances and regulations of 1704, 1744, and 1778, relative to the manner of proving at fea the property of neutral fhips and merchandife, to be carried into effect; confidering that the 1ft article of the law of 3d *Brumaire*, 4th year, ordains as follows: "When a declaration of war againft a nation fhall caufe maritime armaments to take place, the Executive Directory will draw up inftructions, clear and precife, the form of which fhall not leave the leaft doubt to the fearching veffels with refpect to their duty and rights;" confidering that the arrêt of the Executive Directory of the 12th *Ventofe*, 5th year, in the 4th article, in terms clear and imperative, declares lawful prize all the fhips of the United States unprovided with mufter-rolls, and orders them to be treated as enemies; confidering, laftly, that if any fhip be declared a lawful prize, and treated as enemy, the confifcation of her cargo is a matter of courfe; the Tribunal, in conformity with the laws above quoted, and efpecially with the article of the arrêt of the Executive Directory of the 12th *Ventofe*, 5th year, decrees and declares lawful prize the fhip *Catherine*, *Samuel Cazneau* mafter, captured by the private fhip of war *Dugué Trouin*, commanded by captain *Dutache*, together with her apparel and furniture. Decrees and declares further lawful prize all the goods and effects which compofe the cargo of the faid fhip, fince the whole, owing to captain *Samuel Cazneau* not being provided with proper and regular difpatches and papers, is to be deemed the property of the enemies of the French Republic."

The above fentence having been appealed from to the Civil Tribunal of the department of the *Lower Loire*, was confirmed in the following terms: "Confidering that the maritime regulations of 1704, 1744, and 1778, anterior and pofterior to the treaty concluded between *France* and *America*, imperioufly require that all foreign fhips failing in time of war fhould have on board a *rolle d'equipage*, or mufter-roll, authenticated by the public officers of the port from which they fail, under pain of being confidered as good prizes; confidering that the model of the paffport annexed to the treaty of 1778 requires every *Anglo-American*

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captain who has obtained it, to deliver a list, signed and certified by witnesses, of the names, surnames, places of birth and abode of the people who compose his crew, and that *Samuel Cazneau* had but an informal and unsigned list, decrees by judgment in the last resort, that it has been rightly determined by the sentence from which he appeals; orders that that judgment shall obtain its full and entire effect; condemns the Appellant in costs."

The Respondents answered, first, that there was no warranty expressed or implied in the policy; 2dly, supposing the description of the ship as an *American* to imply a warranty, it could not be carried farther than that she was in fact *American*, and was furnished with all the documents usual and required by the law of nations, and by the treaties subsisting between *America* and the powers at war to prove the fact, and that evidence had been given that she had all such documents; 3dly, that the sentences of the *French* court were not conclusive evidence of the supposed warranty not having been] complied with, for that without entering into the question whether sentences of foreign courts, if broadly and clearly pronounced on matter of fact, shut out all contrary evidence in a collateral suit arising in the courts of this country, it was sufficient to say that the sentences in question had not pronounced judgment on the fact; they did not condemn the *Catherine* as enemies' property, or upon any ground recognized by the law of nations, but went avowedly on the non-compliance with certain regulations of *France* which could not bind other nations, or the courts of other nations; and upon a statement of the treaty between *France* and *America* directly repugnant to the express words and obvious meaning of that treaty; and 4thly, whatever construction might have been put upon the policy as worded, the meaning of the parties was ascertained beyond a doubt by the posterior writing, whereby the Appellant agreed to pay, in case of capture or seizure, upon proof given him merely that the vessel was an *American* bottom, and the goods shipped as the property of Messrs. *Henderson* and Co. of *Virginia*. The Judge Admiral decreed in favour of the present Appellants the underwriters. Upon which the now Respondents, the assured, brought the merits of that decree before the Court of Session by an action of reduction, when the Lord Ordinary pronounced an Interlocutor in favour of the assured, to which, after a representation for the Appellants, he adhered. The Appellants,

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1803.

Lothian and Another v. Henderson and Another.

the underwriters, having petitioned the whole Court of Session, that Court unanimously confirmed the interlocutor of the Lord Ordinary; whereupon the underwriters appealed to the House of Lords.

The reasons submitted on the part of the Appellants were in substance,

1st, That the decrees of the Courts of Admiralty were conclusive as to what they decided.

2dly, That the *Catherine* being warranted *American*, and condemned as enemies' property, the warranty was negatived.

3dly, That the *rolle d'equipage* was made a necessary document by the treaty of 1778 between *France* and *America*.

4thly, That the explanatory agreement did not vary the question between the parties.

The reasons submitted on the part of the Respondents were in substance,

1st, That there was no warranty of neutrality, and that the expression of "*American* ship" in the policy was merely descriptive.

2dly, That supposing that expression to amount to a warranty, the assured had established by proofs that the ship and cargo belonged to *Americans*, and that the former had all the documents on board which could be procured at the ports of clearance. [Under this head was inserted a long examination of the several modern authorities on the subjects of warranties in policies of insurance, and of the effects given to foreign sentences as negativing such warranties.]

3dly, That the explanatory agreement relieved the assured from the effect of the sentence of condemnation, it being sufficient under that agreement to give such proofs of the ship and property being *American* as were required by the agreement.

This case was first argued at the bar of the House of Lords in *March* 1802, by *Dallas* and *Adam* for the Appellants, and by the Attorney General (*Law*) and *Alexander* for the Respondents. At that time it was ordered that the case should be again argued, and an intimation was given that the Judges would be summoned to attend. Accordingly in *May* 1803, the case was again argued at the bar of the House (the Judges attending) by the Attorney General (*Perceval*) for the Appellants, and by *Park* for the Respondents. On this argument the counsel on both sides not only

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ſpoke to the ſeveral queſtions, 1ſt, Whether the expreſſions of the policy amounted to a warranty? 2d, What was the true conſtruction of the ſentence of condemnation? And 3d, What was the effect of the explanatory agreement? But alſo argued at great length and with much learning, the admiſſibility in evidence of a ſentence of a foreign Court of Admiralty in an action upon a policy of inſurance, in order to falſify a warranty of neutrality.

After the argument, the Lord Chancellor put the following queſtion to the Judges, *viz.*

Whether in this caſe, taking it to be admitted that the ſhip *Catherine*, when captured, had every document on board to prove that ſhe was *American* and the cargo to be *American* property, which *American* ſhips uſually had, and which had been required by *France* on all former occaſions to aſcertain ſuch facts; and which at the time of her ſailing from *America* were known in *America* to have been required by *France* for that purpoſe; if, upon proof having been made that the ſhip *Catherine* was *American* bottom, as belonging to *American* owners, and upon its having been ſhewn by bills of lading that the tobacco inſured had been ſhipped on account and riſk of Meſſrs. *Henderſon*, *Ferguſſon*, and *Gibſon*, bills payable at four months' date had, after the capture of the ſhip *Catherine*, been given to the aſſured by the underwriters for the amount of their ſubſcriptions upon the policy of the 8th *March* 1797, deducting the ſtipulated premium, and ſuch bills had remained in the hands of the aſſured until after the ſentence of condemnation of the ſaid veſſel, the aſſured could have recovered againſt the underwriters in actions brought upon ſuch bills after and notwithſtanding ſuch ſentence of condemnation, regard being had to the legal meaning and effect of the policy and ſentence, and of the agreement of the 20th *April* 1797?

On the 11th of *July* 1803, the Judges not being unanimous, delivered their opinions *ſeriatim*.

GRAHAM, B. (after ſtating the caſe). The queſtion put by your Lordſhips, apparently complicated, becomes ſimple, by ſtating as diſtinct propoſitions the *data* on which it proceeds, and it will ſtand thus: The ſhip *Catherine*, when captured, had every document on board to prove the veſſel and cargo *American* property which *American* ſhips uſually had, and which had been required by *France* on all other occaſions, and which at the time of her ſailing were known

in

1803.
LOTHIAN and Another v. HENDERSON and Another.

in *America* to have been required by *France*. After the capture proof was made that the ship *Catherine* was *American* bottom, and it was shewn by bills of lading that the cargo had been shipped on account and risk of Messrs. *Henderson*, *Ferguson*, and *Gibson*. Upon this bills payable at 4 months' date were given to the assured by the underwriters for the amount of their subscriptions. Afterwards the ship and cargo were condemned, and after the condemnation of the said vessel the bills remained in the hands of the assured. The question then is, Could the assured have recovered against the underwriters in actions brought on such bills, after and notwithstanding such sentence of condemnation? And we are directed by your Lordships, in considering that question, to have regard to the legal meaning and effect of the said policy and sentence, and of the agreement of the 20th of *April* 1797. I shall take the liberty of considering this question as if the underwriters had given their bills upon the first impression of good faith, without particularly adverting to the legal effect of a subsequent condemnation; for if they are supposed to have given these bills with a distinct view of all possible consequences, I think it can hardly be doubted but that they had bound themselves. And in order to meet the question in all its difficulty, I will suppose that it was a condemnation of the vessel as enemies' property, without ambiguity or apparent injustice. This question depends upon the construction of the policy, and of the agreement. The policy contains no express but at most an implied warranty of the ship, and no warranty of the cargo. Both parties think it requires explanation, and this agreement evidently dictated by a spirit of candour, and a regard to mutual accommodation, takes place. By this the underwriters acquire an undertaking on the part of the assured, to shew by bills of lading that the tobacco was shipped on the account and risk of *Americans*. It is reasonable therefore to presume that they meant to concede something, and I am at a loss to find what that could be, unless it were something as to the mode of proof of the property. At this period, when the mind of every honest man felt afflicted at the facility with which in some of the tribunals of *France* the most established principles of justice were violated; when men of character and honour were driven from the seats of justice which they worthily filled, and their places taken by men base enough to become the mere instruments of the most arbitrary and wanton acts

1803. LOTHIAN and Another v. HENDERSON and Another.

of power, it is reasonable to presume that the underwriters were perfectly aware of the little reliance which the *Americans* would have in the justice of the tribunals so constituted, and the insuperable difficulties they might lie under to make available before them the clearest and fairest possible cases; and that it was the intention of the underwriters to relieve them from some of those difficulties: as if they had said in terms, we do not expect that you should make such a case in *France* as will prevent condemnation, but produce proofs to us of the ship being *American* bottom, and shew us your bills of lading and we will be satisfied, and take the risk of unlawful force upon ourselves. I think that the language of the agreement is strongly expressive of such an intention. The cases provided for are capture or seizure. The term "seizure" imports an unjustifiable taking: if therefore the *French* privateer had as an undisguised pirate run away with the ship without proceeding to any condemnation what were the assured to have done? They were to produce proof as to the ship, and bills of lading as to the goods, and this shews what they meant by producing proof, and when it was to be produced; for if the assured had, in the case of a seizure, without colour of justice, laid before the underwriters or their attorney such documents as would amount to proof in a *British* court of justice, and shewn their bills of lading, the underwriters were, as I apprehend, bound to settle and give bills at four months' date; and by the term "settle" they seem to me to have clearly meant finally settle: for it must be a strange settlement that by a subsequent condemnation should be totally undone. But what they bound themselves to do in case of such a seizure, they bound themselves to do in case of capture under colour of lawful prize; for the language of their engagement applies to both, without possible distinction on the face of the instrument. If they meant a distinction, is it possible to suppose, that they would not have provided for it by saying, that if the ship should be condemned as lawful prize the bills or money should be restored? Nay, would they not have provided for the case by saying that the bills should not be negotiated till that event were known? On the contrary, they agree to settle by granting bills which the next moment may be negotiated, and necessarily become payable, and they stipulate, as the only security which they should have a right to exact, that the insured would come forward in their neutral character, and use their best endeavours to recover

1803.

LOTHIAN and Another v. HENDERSON and Another.

their property as for themselves, but, in fact, as trustees for the underwriters. They consider capture or seizure as the same thing, as necessarily entailing a loss upon themselves, and impose upon the underwriters, as the only thing required of them, an obligation to use their best endeavours to recover the property: this, too, must mean after condemnation, or in the prospect of that event; for before condemnation it was the interest of the underwriters that the insurers should use no endeavours to recover the property, in consequence of which a condemnation would take place, less exceptionable, perhaps, than the present, and in virtue of which the underwriters would be absolutely discharged. But it is said that producing proof imports a right in the adversary to contest the evidence adduced, and to disprove it if he can, and that the underwriters by this agreement cannot be intended to have renounced that right: true; but can it be understood that the underwriters, in conceding the liberty of producing proof, and shewing by bills of lading, *&c.*, meant to avail themselves of a condemnation which totally silenced and annulled that proof? At least they must mean that the legality and truth of such condemnation might be contested. If a right be implied in favour of the underwriters on this agreement to contest the neutrality, surely the express right to the assured to produce proof and bills of lading must mean, that their proof should be heard and weighed. To me it seems clear, that the underwriters looked to an inquiry at home, and not in a foreign court; for in case of capture or seizure, all that the assured are required to do as a condition precedent is to produce proof of the ship being *American* bottom, and shew by bills of lading, *&c.*; not a word is said of waiting for the event of condemnation: a most material circumstance, if intended, and I am authorised to say, by the manner in which this case is put, that after compliance with those express requisites, they were bound to give the bills, and bound to give them as upon a settlement, which imports, to my understanding, a final settlement and conclusion of the transaction. I therefore think, that this is a case in which the assured have performed, on their part, every thing that was required of them by the underwriters, and that they are entitled to demand a full performance of the engagement on the part of the underwriters, by granting bills at four months; and I think that such bills were intended, as they purport to be, irrevocable and unconditional securities, and that the subsequent condemnation is no bar to a recovery on them in the hands of the assured themselves. Having come to this conclusion on suppo-

sitions

1803.

Lothian and Another v. Henderson and Another.

sitions that the condemnation was clearly on the ground of enemies' property, I am relieved from the necessity of saying what I think of these disgraceful sentences, and how far an *English* court of justice is bound to adopt their conclusions, when directly contrary to the premises from which they are drawn. The sentences in substance, and almost in terms, say this; The ship is *American*, the goods are *American*, but the captain had not on board that which he was not bound to have, which he could not by any possibility know was required of him; and therefore we deem them (what no rational being can) to belong to enemies of the Republic. I cannot: for this record, be it what it may, amounts to this: We pronounce them enemies' property because we are bid, and dare not do otherwise. To receive such sentences as conclusive would be in effect to say that we give no credit to what they truly state, but absolute credit to what they falsely conclude. As to the argument of the impolicy of contracts by which the losses of neutrals (as the *French*, it is said, are studious to contrive) are thrown upon ourselves, and the neutral nation prevented from asserting with energy its rights as such, being indemnified against the acts of violence and injustice of one of the belligerents, it opens too wide a field of consideration; it is rather the subject of discussion with a view to regulation, and has too much of novelty in it in courts of justice to form the ground of a legal objection to a contract in other respects fair and unexceptionable. I am therefore of opinion that, under the circumstances stated by your Lordships, the assured could have recovered against the underwriters in actions brought on the bills, after and notwithstanding the condemnation.

Chambre, J. In offering my opinion on the question proposed by your Lordships, I shall first consider the legal meaning and effect of the agreement referred to at the close of the question, and whether the intention of that agreement was in case of loss by capture or seizure to make the underwriters at all events liable to such loss, independent of any effect which a sentence of condemnation might otherwise have had upon the warranty contained in the policy, there being such proof of the fact warranted as would have been sufficient if no such sentence had been pronounced, and assuming for the present that such sentence would otherwise have had a conclusive effect upon the warranty. If it can be clearly collected from the agreement, as is expressed in the writing signed by the underwriters, that such was the real meaning and intention of

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1803.
LOTHIAN and Another v. HENDERSON and Another.

the parties, that intention muſt prevail; but I think we muſt diſcover the intention by ſomething more than bare poſſibility or conjecture. At the time when the agreement was made the underwriters had by the terms of the policy a clear right to all the advantages of a warranty that the ſhip was *American*, it having been long ſettled that ſuch a deſcription as is contained in this policy does amount to a warranty. Having this right under the policy, the underwriters cannot in my opinion be deprived of it, unleſs their intention to abandon the right is equally clear. Let us ſee then what the terms of the agreement are, what are the doubts which had ariſen in the minds of the parties, and how they endeavour to clear thoſe doubts. It begins by reciting that doubts had ariſen how far by the inſurance on tobacco made by the policy in queſtion there was a warranty of property, and what was to be underſtood by ſuch a warranty. The bare recital of theſe doubts ſhews that the parties to this inſurance had not much experience in matters of inſurance, and did not poſſeſs that knowledge of the ſubject which merchants and underwriters in general do, which may afford ſome argument againſt affecting their intereſts by ſuch preſumptions as could only ariſe from ſuppoſing them perfectly conuſant of the legal reſult of every circumſtance that might happen to the property or ariſe in the conduct of the aſſured. The doubts however that had been entertained they ſolve in this way: They declare, that in caſe of capture or ſeizure the aſſured, before they claim for a loſs, muſt produce proof of the ſhip being an *American* bottom, and by bills of lading ſhew that the tobacco ſhall have been ſhipped on account and riſk of Meſſrs. *Henderſon*, *Ferguſſon*, and *Gibſon*. Here they put it out of all doubt that the fact of the ſhip being an *American* bottom was meant to be warranted, and that diſpoſes of all the arguments ariſing from the ſuppoſed high rate of premium. They not only put the warranty of the ſhip out of doubt, but they add, what was not contained in the policy, an engagement on the part of the aſſured to prove (but only in the manner there mentioned) the ſhipping of the tobacco on account and riſk of the particular perſons mentioned in the agreement. In this part of the agreement the parties ſeem to diſcover a further degree of ignorance upon the ſubject, and to have ſuppoſed that the warranty could become material only in the caſes of ſeizure and capture. This however being a caſe of capture, it is not neceſſary to determine whether by that mode of expreſſion in the agreement the warranty is narrowed to thoſe two

1803.
LOTHIAN and Another v. HENDERSON and Another.

cases or not. The agreement having thus required proof generally of an *American* bottom, and a particular mode of proof as to the other fact, proceeds thus: "Upon which we shall settle by granting our bills at four months' date for the amount of our subscriptions, deducting the stipulated premium, in full dependence that the insured will use their best endeavours to recover the property as for account of the shippers." The doubts, if there be any, on the effect of the agreement must arise from this latter part of it, coupled with the requisition of proof in the former part; and it is contended at the bar, that the underwriters, having agreed that upon proof of the ship being *American*, and production of bills of lading, they will pay the amount of their subscriptions by bills at four months, and stipulating for or rather expressing their reliance on the endeavours of the assured to recover the property, are bound to pay upon a disclosure of such documents and evidence, as supposing no sentence produced would entitle them to recover in a court of justice; that the underwriters are bound by the state of the evidence at the time of the capture, or of the notice of it, and are not entitled to the benefit which would arise to every other underwriter from a condemnation of the property as enemies' property. I cannot accede to such a construction of the agreement. What is meant by the requisition of the proof, no particular species of proof being mentioned? Surely proof in a court of justice, if required. Strictly speaking, what is produced or communicated in the private transactions of the parties themselves is not proof. If underwriters are satisfied by what is disclosed to them, they may pay; if they withhold payment and are dissatisfied without reason, they will ultimately have further damages to pay. But can it be said that under this agreement they may not go into a court of justice and require the proof to be made in the usual manner; and if they do, is it to be *ex parte* evidence? Is the Defendant to be precluded from opposing it by contrary evidence, or any evidence that will destroy the effect of the Plaintiff's evidence? And why is an underwriter to be precluded from giving evidence of a sentence any more than he would from giving evidence of fraud, forgery of documents, misconduct of the assured, or any other matter that would repel the justice or legality of the Plaintiff's claim. I should require a very clear and explicit declaration of intention to induce me to hold that opinion. Suppose the sentence of condemnation to arrive at the same time with the intelligence of the capture. Is the evidence to be taken par-

 tially?

1803.

Lothian and Another v. Henderson and Another.

tially? Is that the declared intent of the parties? And if the whole is to be received as evidence, must not the sentence have its legal effect? How does that case differ from the present? If before a sentence was pronounced, or before the evidence of it was received, the parties should proceed to a trial, and the Plaintiffs recover by the judgment of the Court, I admit that they might not be compellable to refund, because the Court who tried the cause had cognizance of the fact, and acted right upon the evidence; but in this case conclusive evidence has arrived in due time, and the Court in which this action was tried I think was bound by that evidence. It seems impossible that the mode of payment by bills should make any difference. If that had not been stipulated, the money would have been payable immediately upon the loss. If no credit had been given, an action would have immediately lain, supposing that there was no fact in the case that afforded a legal answer to it. The credit is for the benefit of the underwriters, and not of the assured. With respect to what is stated in the agreement respecting the endeavours of the assured to recover the property, no necessary conclusion arises from thence. Arrests, takings at sea, detainments, &c. are among the risks insured against. There are many cases in which those endeavours might be of important use to the underwriters, as in the case of capture and recapture. So in the case of a capture or seizure without any ground of condemnation and terminating in a discharge, the underwriters would be liable for the damage sustained, and greatly interested in the endeavours of the master to explain his situation, and obtain a speedy discharge. I think it most probable that nothing respecting a sentence of condemnation was at all in the contemplation of the parties; if it had been, surely nothing could have been more easy than to have said, in express terms, that the policy should not be affected by the sentence of any foreign Court. It appears to me therefore that the explanatory agreement has not varied the question. I shall now proceed to consider the effect of the *French* sentence of condemnation in this case; and attending to the language of that sentence I cannot but be of opinion that the *French* Court founded its decision on the fact of the ship *Catherine* being enemies' property. This being my opinion, I think the sentence conclusive against the claims of the assured, agreeable to all the decisions upon the subject, beginning with the case of *Hughes* v. *Cornelius* (*a*), (confirmed as that was

(*a*) 2 *Show.* 232. *Raym.* 473. and *Skin.* 59.

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1803.
LOTHIAN and Another v. HENDERSON and Another.

by ... in two ...). and pursuing them down to the present period. It is true, that in *Hughes* v. *Cornelius* the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance where the non-compliance with a warranty of neutrality is in dispute. But from that period to the present the doctrine there laid down respecting foreign sentences has been considered equally applicable to questions of warranty in actions on policies, as to questions of property in actions of trover. It has been supposed indeed that the cases warrant a distinction between those sentences which expressly take into consideration and ultimately decide the non-neutrality of the ship, and those in which the same point does not appear to have come so immediately under the consideration of the foreign Courts. But I think wherever the Courts in this country have been able to collect from the sentence that the point of neutrality has been decided, they have held themselves bound by that decision. Indeed the doctrine upon this subject is most ably summed up in the admirable judgment of the Master of the Rolls, in *Kindersley* v. *Chase* (*b*). Had the *French* sentence in this case merely stated the *French* ordinances, without concluding as they have done, this case might have fallen within some of the late determinations of the Court of King's Bench. But the *French* Court has gone further in their determination, and app ... e facts and the ordinances they have drawn a conclusion which perhaps no court in this country would have done, but by which they have decided that the ship *Catherine* being an *American* had forfeited her neutrality. I am therefore of opinion that the assured are bound by this decree of the *French* Court. A question has been raised in ...

... condemnation had arrived, they could have legally refused payment of their bills? Supposing the bills so given to have been indorsed over into other hands, undoubtedly payment of the bills could not have been resisted. Connected with the first question another ensues, *viz.* Whether, if the money had been actually paid, it could have been recovered back? I think payment of the bills while in the hands of the assured might have been resisted, or the money, if paid, might have been recovered back. If the sentence be conclu-

(*a*) *Green* v. *Waller*, 2 *Ld. Raym.* 893., and *Ewer* v. *Jones*, 2 *Ld. Raym.* 935.

(*b*) Vide *Park's Insurance*, 5th edition, p. 363. e.

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1803.
Lothian and Another v. Henderson and Another.

five, it must be conclusive to all purposes whatever, and must overturn every fact established by other evidence. If so, the bills would have been given under a mistake of what ultimately turned out to be really the fact, and then the consideration upon which they were given would have failed *ab initio*.

Le Blanc J. The question which your Lordships have been pleased to propound to the Judges appears to me necessarily to involve these objects for consideration: The legal meaning and effect of the policy of insurance; of the sentences of condemnation by the several courts of Admiralty in *France*; and of the memorandum of agreement subscribed by the underwriters of the 20th *April* 1797. If, on mature consideration, we had been able to concur in opinion on the meaning of the subsequent agreement, and our opinion had been unanimous in favour of that construction contended for at the bar by the counsel for the Respondents, the assured, it might perhaps have been superfluous to have entered into the consideration of the two first points; *viz.* the meaning and effect of the policy and of the sentence; because if, as the assured insisted, the subsequent agreement meant to exclude from the proofs in the cause any sentence which might be made in any court of Admiralty or prize, or to give to the words of the policy a different construction from that which the instrument on the face of it imports; I say, if that had been the clear effect of the agreement, it would have taken this case out of the general rules of law, as applicable to cases resting solely on a policy and sentence of condemnation such as appear in this case. But, inasmuch as we have not been able to arrive at the same conclusion in our several modes of construing this agreement, it may be thought right, at least for such of us as may happen to dissent from the construction put on it by the counsel for the assured, to offer to your Lordships our opinion on the effect of the policy and sentence which, in our view of the memorandum, becomes material to be considered in order to furnish an answer to the question submitted to us. It has scarcely been denied at the bar, that the terms of this policy, "of and in the good ship or vessel called the *Catherine*, an *American* vessel," amount to an express warranty of the ship being *American*, which was a neutral nation in the war, nor could it have been otherwise contended after the uniform current of authorities in which such an averment has been decided, or taken for

granted

1803.

LOTHIAN and Another v. HENDERSON and Another.

granted to be a warranty, as much as if the word warranted had been inserted in the policy; for I take this to be an established proposition, that every positive averment or allegation on the face of the instrument, and making a part of the written contract, whether inserted in the body of it, or written in the margin in a line with the body of the instrument, or transversely, amounts to a warranty, or condition. And if such allegation or stipulation be not strictly true, the assured cannot recover on the policy to whatever cause the loss be owing, whether the loss be connected with the subject of such warranty, or wholly independent of it: for it is a condition on which the contract is to take effect, which failing, the contract fails. Such being the effect of the allegation in the policy, "an *American* vessel," the next question is as to the meaning and effect of the sentence of condemnation of the Admiralty Courts in *France*. The first sentence of the Tribunal of Commerce of the canton of *Nantz* states, in the outset, what the question is, thus: The question is to know, Whether the *American* ship, *Samuel Cazneau* master, and her cargo, are to be declared lawful prize? It then states the circumstance of the capture and examination of the persons and papers on board; and, maturely weighing the whole matter, and considering the several circumstances, and articles of their laws; considering, lastly, that every ship declared enemy and good prize carries with it, of course, the confiscation of her cargo; the Tribunal decrees and declares lawful prize the ship *Catherine*; decrees and declares farther, lawful prize all the goods and effects which compose the cargo; since the whole, owing to the captain, *Samuel Cazneau*, not being provided with proper and regular dispatches and papers, is to be deemed the property of the enemies of the *French* Republic. The second sentence of the Court of Appeal of the Civil Tribunal of the department of the *Lower Loire*, sitting at *Nantz*, states, that the privateer stopped the ship *Catherine* because she was not provided with papers sufficient to prove her neutrality, and particularly a *rolle d'equipage*, and that the first sentence had adjudged both ship and cargo lawful prize. This Tribunal, considering, &c. decrees by judgment in the last resort, that it has been rightly determined by the sentence from which he appeals, orders that that judgment shall obtain its full and entire effect, and condemns the Appellant in costs. On reading these sentences, is there any doubt of their meaning? Is it not clear that the Court condemned the ship as being,

1803.
LOTHIAN and Another v. HENDERSON and Another.

being, or as being to be considered as enemies' property, which is the same thing? The first sentence condemns her as lawful prize, and adjudges her to be considered, deemed, or taken, as belonging to enemies of the Republic, and states the evidence and grounds by which they are led to that conclusion. The sentence of the Court of Appeal, introducing itself by stating the cause of her being stopped to have been that she was not provided with papers to prove her neutrality, decrees that it has been rightly determined by the Court below, and affirms the sentence *in toto*, with costs of appeal. What is this but adopting the grounds on which the Court below had decided? It is evident, on reading these sentences, that the Courts meant and professed to determine that she was to be considered as enemy's property, and liable to condemnation as such. If that be so, the sentence falsifies the warranty or allegation in the policy that she was *American*. And no case can be found in which a court of law here has taken upon itself the examination of and exercise of any jurisdiction over the propriety of the conclusion which the courts abroad have come to or the evidence from which they have drawn that conclusion, where they have concluded her to be prize. Where, indeed, the Court has seen on the face of the sentence that the court abroad has condemned the ship on other grounds than as being enemies' property, we have held that such sentence did not falsify the warranty of *American* or neutral; and so far only have our Courts here looked into the sentences of the Courts of Prize as to see whether the property was condemned as enemies' or not. But wherever it has appeared by the sentence that the Court abroad has come to the conclusion that the ship was or was to be deemed or considered as enemies' property, no matter by what deductions they came to that conclusion, we have uniformly held ourselves bound by their conclusion, without feeling ourselves at liberty to examine their premises. This will be found to be the result of the decisions in *Mayne* and *Walter* (a), and *Bernardi* and *Motteux* (b), in the time of Lord *Mansfield*; and *Pollard* and *Bell* (c), *Bird* and *Appleton* (d), and *Price* and *Bell* (e), in the time of Lord *Kenyon*; and of *Baring* and *Claggett* (f), lately decided in the Court of Common Pleas. The language of our Courts has uniformly been, We will not examine the justice or propriety of the sentence; we will only look into it to see what it has professed to determine; and if

(a) *Park. Insur.* 363.
(b) *Doug.* 554.
(c) 8 *T. R.* 434.
(d) 8 *T. R.* 562.
(e) 1 *East*, 663.
(f) 3 *Bos. & Pull.* 201.

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we find that it has professed to determine on the ground of the property being enemies', we will hold ourselves bound by it, although from the premises stated we should, if it had been competent to us, have drawn a different conclusion. Lord *Mansfield*, in *Bernardi* v. *Motteux*, in answer to an observation of Mr. *Lee*, of the danger and inconvenience of examining foreign sentences, says, "this supposed inconvenience would be entirely obviated, if the foreign Courts would say,* in their sentences, *condemned as enemy's property*." That these sentences are admissible and conclusive evidence of the fact they decide, it seems not safe now to question; from the time of *Car.* 2. to this day they have been received as such, without being questioned. In the discussion of the nature of such evidence before this House, in 1776, it seems not to have been controverted; and the cases, I may say, are numberless, and the property immense, which have been determined on the conclusiveness of such evidence, in many of which cases the forms in which they came before the Courts in *Westminster-hall* were such as to have enabled the parties if any doubt had been entertained, to have brought the question before a higher tribunal. Such being the construction of the policy, and such the meaning and effect of the sentences as applicable to such policy, it remains to be considered what is the effect of the memorandum or agreement of 20th *April* 1797, signed by the underwriters. Independent of that agreement, the situation of the underwriters and assured stood thus: the insurance depended on the condition of the ship, being *American*; if a loss happened from whatever cause, by sea risk, by fire, by capture, detention, or seizure, it would be incumbent on the assured, to entitle themselves to an indemnity from the underwriters, to prove that the ship was *American*, that proof might be answered and controverted in any way by the underwriters; and in case of a capture and sentence of condemnation as prize simply, or on the ground of enemies' property, such sentence would be conclusive against the claim of the assured. Such being the legal rights of the parties under the policy, does the memorandum shew a clear and manifest intention in the underwriters to surrender their right of combating any proof which the assured might bring forward of the ship being *American*, or to narrow the warranty under which they had contracted? I cannot find such clear intention on the face of the memorandum. It recites that doubts had arisen how far there is a warranty of property, (does not say in the ship or the goods; and as to the goods there

1803.

LOTHIAN and Another v. HENDERSON and Another.

was not any warranty,) and what is to be underftood by fuch a warranty. It is declared, that in cafe of capture or feizure the affured, before they claim for a lofs, muft produce proof of the fhip's being *American* bottom; it does not fpecify any particular proof, but of courfe leaves it open to the affured to bring any proof, and to the underwriters to meet that by any contrary proof. Now on this part of the cafe, fuppofe notice of the capture and condemnation had reached the parties at the fame time, would this have prevented the underwriters making ufe of the fentence to rebut proof produced by the affured, or to preclude fuch proof being given? With refpect to the goods, the memorandum points out the particular proof, *viz.* the bill of lading; but no fuch fpecific proof is pointed out as applicable to the fhip, but it is left on proof generally, which includes every fpecies of proof, and contrary proof, "upon which we fhall fettle by granting bills at 4 months," that is, upon fatisfactory proof. Then comes the latter claufe, "in full dependence that the infured will ufe their beft endeavours to recover the property as for account of the fhippers." This may be faid to infer that the underwriters looked to the cafe of a capture and condemnation as the event on which they would pay, leaving it to the affured to procure a reverfal of the fentence, or reftitution of the goods. But is that a neceffary inference? The terms ufed are in cafe of capture or feizure generally; and there may be cafes where underwriters may be called on to pay as for a lofs by capture or feizure where there may be no condemnation, as a capture and fubfequent re-capture, a feizure or capture by pirates, &c. in which, labour and expence might be neceffary to procure a return of the goods. It feems to me as if they did not contemplate the cafe, or the effect of the fentence; fuppofe this agreement had been in the body of the policy, it appears to me that this claufe does not neceffarily infer an intention in the underwriters to ftipulate for payment of the lofs in cafe of capture, renouncing the clear right vefted in them by the terms of the policy of ufing a fentence of condemnation as enemies' property, as evidence to negative the averment in the policy, which was a term or condition of their fubfcription. And where their right is clear on the original contract, and the law as applicable to it, it is not to be taken away by doubtful words. On the whole therefore I humbly fubmit it as my opinion to your Lordfhips, that by the terms of this policy the affured have warrant-

ed the ſhip *Catharine* to be *American*, if that be falſified, the contract of aſſurance becomes void; that the ſentence of a Court of Admiralty abroad, being a ſentence of a Court of excluſive juriſdiction proceeding *in rem*, condemning the ſhip as enemies' property, is concluſive evidence to falſify the averment in the policy of her being *American*; that the ſentence in this caſe has condemned as enemies' property, and therefore has falſified the averment in the policy; and that the agreement ſubſcribed at the foot of the policy does not ſufficiently manifeſt an intention in the underwriters to preclude themſelves from the uſe of any ſpecies of evidence which the law allows to falſify the warranty, or otherwiſe to reſtrain or limit the legal effect of the warranty in the policy in caſe of capture or ſeizure.

LAWRENCE, J. The proof of the ſhip *Catharine* being an *American* bottom, upon which proof the underwriters are ſuppoſed by the queſtion to have given bills at four months, is, I apprehend, to be taken as proof, without the concealment of any fact or circumſtance which exiſting at the time might weigh in the judgment of the underwriters as to their obligation to give thoſe bills, and under ſuch circumſtances I think the aſſured could have recovered againſt the underwriters, in actions brought upon ſuch bills, after and notwithſtanding ſuch ſentence of condemnation, regard being had to the legal meaning and effect of the policy and ſentence, and of the agreement of the 20th of *April*. And the grounds of my opinion are, that in ſuch caſe the bills would have been given without any fraud practiſed upon the underwriters to induce them ſo to do. They would have been given with a communication of every exiſting fact material for their conſideration, with a knowledge of the capture, and without any deſire to delay payment till a deciſion as to its legality; ſuch caſe would have involved no ignorance of fact; there would have been no miſtake or deceit; the giving the bill would have been the voluntary act of the parties; the not requiring the granting them to be delayed until a deciſion as to the legality of the capture, would have been a waver of any advantages ariſing from what might have been the event of ſuch determination. In my opinion, in ſuch caſe there would have been a good conſideration for the bills; *viz.* the premium received by the underwriters, the capture of the veſſel, and a fair diſcloſure of all circumſtances required by them to enable them to determine whether they

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1803.
Lothian and Another v. Henderson and Another.

should settle the loss or wait the event of the proceedings against the ship, and if there would have been a good consideration, the consequence is, that the assured would be able to recover on the bills. In *Knibbs* v. *Hall*, 1 *Esp.* 84. where one paid money to avoid a distress, Lord *Kenyon* held, that being a voluntary payment it could not be recovered again; and in *Bilbie* v. *Lumley*, 2 *East*, 469. it was held, that if a party pay money with a full knowledge of all the facts of the case, he shall not recover it back on account of his ignorance of law. But as the consideration of the question upon this narrow ground will not, as I apprehend, answer the purposes for which your Lordships directed our opinion to be taken, I proceed to state what appears to me to be the law upon those other points arising out of the question; first, Whether the explanatory agreement shuts out the effect of the sentence of condemnation? And 2dly, What is the effect of that sentence? With respect to the explanatory agreement, or rather explanatory declaration, I think with those of my brethren who have already delivered their opinions, that it has not at all varied or narrowed the sort of proof, which it is in general competent to the assured to adduce in support of his claim, or to the underwriters to use in resisting it. It is extremely probable that neither of the parties understood the subject sufficiently to advert to and provide for the questions which ordinarily arise from the variety of events to which such a voyage is subject, and it is possible that their design may have been to settle their rights, without regard to the sentence of any Court in case of capture. But this does not in my opinion go further than conjecture. And I think it by no means clear that the underwriters intended by this declaration any thing more than to explain to the assured (who seem to have been little acquainted with the construction put upon policies) the meaning and effect of the instrument, without any design of altering or varying the circumstances according to which, by the forms of the policy, they were liable for the losses insured against. But if this declaration has subjected the underwriters to a loss under circumstances different from those by which only they could be affected according to the terms of the policy, it must be either from the loss by capture being the only one which is noticed by this declaration, or from the mode in which the loss was to be settled, or from the reliance which the underwriters profess to place in the endeavours of the agents of the assured to recover the property as

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for the account of the shippers. Had there been no such agreement or declaration, and the claims of the assured had rested merely on the policy, they would have had no demand on the underwriters without being able to prove the ship an *American* ship, and it would have been competent to the underwriters to controvert the proofs adduced by contrary proofs, and among other proofs by the sentence of the tribunal of *Nantz*, supposing it to be admissible in evidence. It is there to be seen, first, whether mentioning the case of capture only, and not taking notice of any other loss, will make a difference as to the proof; and I conceive it will not. For it seems to me, that the only effect of those words, giving them their utmost latitude, is to narrow the warranty to the case of capture, and to subject the underwriters to every loss except that of capture, though the ship were not *American*; but if a loss were claimed in consequence of capture, she must then be proved to be an *American* bottom. The only possible effect they can have seems to me to narrow the extent of the warranty, but not the nature of the proofs: there is nothing in the agreement descriptive of them, as that it shall be sufficient to prove it by bill of sale, register, sea-letter, or other document. Nothing is pointed out as the proof which will be satisfactory, as is the case with the tobacco, where the bills of lading are mentioned; but what the proofs to be produced may be is left generally, without any restriction to be determined in case of dispute, by the rules of law. The next part of the agreement from which it may be argued that the loss was to be paid, without regard to the sentence, is that by which it is agreed, that upon proofs being produced of the ship being an *American* bottom, and upon its being shewn by bills of lading that the tobacco was shipped by *Henderson* and Co., that the underwriters would settle by bills at four months' date. But this does not, I think, vary the obligation of the underwriters. The force of any argument derived from this provision, must, as it appears to me, rest on this assumption, that the bills might be required before sentence, and that it could never be the intent of the parties that the payment of those bills should be defeated by a sentence given after the bills were granted, or that money paid should be refunded, to effect which it might be necessary to have recourse to persons on the other side of the *Atlantic*. In answer to this argument I think it may be said, that the question is the same as if the agreement had been to pay in money upon producing proof that the *Catherine* was an *American* bottom; and if

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1803.
LOTHIAN and Another v. HENDERSON and Another.

the time of payment is to weigh, the more immediate the payment the ſtronger the argument ariſing from thence. If the agreement had been to pay in money, it would have left matters in that reſpect on the foot of the policy, or would not have varied the obligation of the underwriters: and had the aſſured proceeded againſt the underwriters before the ſentence of the Prize Court, the deciſion of which might affect and be material in determining the rights of the parties, all proceedings would, according to the practice of our Courts, have been ſtayed until ſuch deciſion had. If, in that caſe, the underwriters could not be compelled to pay the money, they could not, in this, be compelled to grant the bills. The obligation to pay, or give ſecurity for payment at a future time, ſtands, as it appears to me, exactly on the ſame foundation, *viz.* the aſſured being able to produce proofs of the performance of that condition, which rendered the underwriters liable. The time from which the bills would have to run would be the producing proof of the ſhip being an *American* bottom, and the production of the ſpecified bills of lading. But that proof muſt be allowed to be examined; it muſt be competent to the underwriters to object to the proofs not being complete; and if time ſhould be neceſſarily ſpent in that examination, without any effect which could contribute to a ſucceſsful reſiſtance of their payment, and if the proofs produced were, on their firſt production, complete to eſtabliſh every fact compriſed in the warranty, their date muſt refer back to the production of that proof which was not weakened by examination; and if more time ſhould be ſpent in the examination than the time mentioned in the bill, the underwriters, who would have unſucceſsfully delayed the payment, muſt make a compenſation in damages for that delay, juſt as they would if the loſs had been payable in money. The fallacy of the argument deduced from this part of the agreement conſiſts in conſidering the underwriters liable to grant their bills at four months, under circumſtances which, if the ſentence is not laid aſide, might, in the event, lead to a ſuppoſition ſo improbable, as that it ſhould be in the contemplation of the parties to pay large ſums of money, and afterwards reſort to perſons in *America* to recover them back. But if by law, they would not be liable in an action for not granting the bills until the deciſion of the Prize Court, the difficulty is removed: the underwriters would not have the inconvenience of reſorting to *America*, but only that of being liable to intereſt for a delay of

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payment. The laſt circumſtance in the agreement from whence it may be inferred that it was intended to ſhut out any effect of the ſentence of a Prize Court, is the dependence which the underwriters place in the agents of the aſſured to uſe their beſt endeavours to recover the property, as for account of the ſhippers. In order to found any argument on this circumſtance to prove that the underwriters meant to pay the loſs without any regard to the ſentence, it muſt be ſhewn that ſuch proviſion as this was meant to be applied to every caſe of capture, and among them to the caſe which has happened of the captured veſſel being condemned as enemies' property, for as I underſtand the argument it is this; the underwriters look to the inſured to recover the property in caſe it be condemned as enemies' property; but this they could not have ſtipulated for, unleſs they had meant to pay the loſs if the ſhip ſhould be condemned on that ground. The force and effect of this argument ariſes from a ſuppoſed inconſiſtency in ſuch proviſion with the underwriters inſiſting on the ſentence in anſwer to the demand of the aſſured. But the argument has no foundation if the endeavours are properly to be referred only to thoſe caſes in which ſuch endeavours might be exerted for the benefit of the underwriters, conſiſtently with their being able to make uſe of ſuch ſentence; for no argument can be drawn to prove them liable in a caſe falling within the condition or warranty from a proviſion to ſecure to them a benefit in caſes where, by the terms of the policy, they would be liable for a loſs. In the caſe of capture and acquittal, the voyage might be defeated, and the aſſured be entitled to abandon, and call on the underwriters as for a total loſs. But I think thoſe caſes ſufficiently account for this proviſion, without making uſe of a ſtrained inference to render the underwriters reſponſible in a caſe where, by the terms of the policy, they are not liable; to do which, this dependence on the endeavours of the aſſured muſt be extended to the caſe of capture and condemnation as enemies' property, inſtead of its being applied to other caſes to which it may be referred conſiſtently with the engagements of the underwriters, conſtrued in the manner in which they are uſually underſtood. The dependence of the underwriters on *Henderſon* and *Riddell* to uſe their endeavours to recover the property, as for account of the ſhippers, is in effect nothing more than a dependence that they will endeavour, in caſe of ſeizure or capture, to get back the tobacco on account of the perſons who ſhipped it, by

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1803.
LOTHIAN and Another v. HENDERSON and Another.

which the claim on the underwriters would be diminished in those cases where a claim could be made. But the underwriters could only have wished for such endeavours in cases where some benefit might result to them from those endeavours, which could only be by lessening the loss in cases where they would be liable; and if we look at the policy to discover those cases, that of hostile capture and condemnation is not one, and if we refer to the antecedent part of the explanatory declaration, there is nothing, for the reasons I have submitted to your Lordships, from whence it can be collected that the underwriters meant to extend their responsibility beyond the terms of the policy. The remaining point to be considered is the legal effect of the sentence of the Tribunal of Commerce of the canton of *Nantz*. As to which, after the continued practice which has taken place from the earliest period, in which, in actions on policies of insurance, questions have arisen on warranties, to admit such sentences in evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purport to decide directly, I apprehend it is now too late to examine the practice of admitting them to the extent to which they have been received, supposing that practice might, upon the argument, have appeared to have been doubtful at first. On the authority of those decisions men have acted for a long series of years, and entered into contracts of assurance in this country with a perfect knowledge of such decisions, and, in expectation of the questions arising out of such contracts, to which such decisions are applicable, being ruled by them; and though it might have been at first much better, in the interpretation of policies of assurance, to have given them a a much narrower construction, and not to have held warranties to the extent to which they have been carried, to be inferred from such words as are used in this policy, or from similar expressions of great generality; yet such expressions having, by a variety of decisions as to their effect, acquired a defined and known sense and meaning, according to that sense and meaning they must now be understood; and after the many cases in which, in contradiction of a warranty of neutrality, sentences of Courts of Prize have been received in evidence, a warranty of neutrality must, I conceive, now be understood as containing in itself, amongst other things, a stipulation that the contract of assurance shall be void if the subject-matter warranted neutral be condemned as enemies' property; and if a warranty of neutrality contains this stipulation, the sentence of

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a court of competent jurisdiction condemning a ship on account of its want of neutrality, is the proper evidence, according to every principle and rule of our law, to determine that fact. In receiving such sentences in evidence, the Courts of *Westminster-Hall* have not in any instance of which I am aware ever taken upon themselves to review or consider the propriety of the determinations of any Court of Prize; but, on the contrary, have expressly renounced any such authority. Where the sentence has expressly condemned a vessel as enemies' property, they have held themselves bound by such determination; and they have never looked at any other part of the proceedings than the sentence, or examined the reason of it but with a view of discovering the ground of such determinations in cases, where that ground was not distinctly marked and pointed out by the sentence; and in doing this, I conceive that any circumstance to be found in the proceedings, or adduced in evidence, from whence the sentence may be inferred with sufficient certainty to have proceeded upon grounds inconsistent with the warranty, would make such sentence conclusive against the warranty. If it appeared that the proceedings were in a Court, which had no jurisdiction but in cases of hostile capture, and a sentence of such Court, condemning a ship as prize, were produced in evidence, that would, as I conceive, be conclusive in our courts against a warranty of neutrality, whatever might be the grounds or reasons for such sentence; because it could not be taken that a Court so constituted could condemn upon any other ground, however erroneously they might act. But the title or description of a Court does not often point out the extent of its jurisdiction. In the case now under consideration, the Court is called the Tribunal of Commerce of the canton of *Nantz;* a title from whence it may be inferred that they had a jurisdiction much beyond questions of prize, which do not seem naturally to belong to a judicature of that description. Questions between merchants, and questions of revenue, seem more likely to be the object of its jurisdiction, than questions of hostile capture. But even if the court had been described as a Court of Admiralty, I do not know how our Courts could infer from thence that its jurisdiction was solely that of hostile capture, for in our own country the Court which has the sole jurisdiction of prize, and a Court of a very different jurisdiction are indifferently called, though not correctly, by that name. In order, therefore, for our municipal courts to judge of the grounds upon which a foreign

1803.
LOTHIAN and Another v. HENDERSON and Another.

Court condemns a ſhip from the conſtitution of the Court, the juriſdiction of that Court muſt appear either from the title or the proceedings, or be proved by evidence; if neither of theſe things happen, other *media* muſt be reſorted to to diſcover the foundation and ground of its determination, if that does not diſtinctly appear. In the courſe of the argument at your Lordſhips' bar, it was not denied by Mr. Attorney-General that the proceedings of a Court might be looked into to ſee whether a condemnation of a captured veſſel proceeded upon the ground of the breach of ſome revenue law, as ſmuggling; and if our municipal Courts may look into the ſentence to ſee whether the breach of a revenue law be the ground of condemnation, they, by a parity of reaſoning, may look into the proceedings to diſcover, as far as they may be able, whether the condemnation was on any ground not inconſiſtent with the warranty of neutrality; for the admiſſibility of a ſentence of condemnation in evidence, can only be contended for upon the ſuppoſition that it contradicts the truth of the warranty, which can only be when the ſhip is condemned, for ſome cauſe inconſiſtent with that warranty. The municipal Courts of this country, in examining whether or no foreign Courts have in their ſentences of condemnation proceeded according to the law of nations; have never ſo done with a view of deciding in a different manner where ſuch determination has not been conſiſtent with thoſe laws, than they would have done if in their opinion ſuch determination had had thoſe laws for its ſupport; for however repugnant to their ſenſe and reaſon ſuch ſentences have been, the municipal Courts of this country have ever felt themſelves bound by ſuch ſentences, whenever they could diſcover the point they expreſsly meant to decide. When that has not, as they have thought, been diſtinctly ſtated, and upon examining the reaſon of the ſentence, they have found a ſhip condemned on grounds inconſiſtent with the law of nations, they have been led to conclude that the condemnation has been for ſome other cauſe than that of enemies' property, and to refer it to other grounds to be collected from the proceedings, inaſmuch as a condemnation as hoſtile prize, according to their underſtanding of the ſubject, ought and could only juſtly proceed on the foot of thoſe laws; and though in their determination upon thoſe occaſions they may have drawn wrong concluſions, the principle upon which they have acted can hardly be controverted, which has been ſimply that of diſcovering whether or no

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the warranty was or was not contradicted by the sentence of condemnation. Until that is ascertained, it is impossible to say whether any sentence offered in evidence can have any and what relation or bearing on the question in judicature. The case of *Bernardi* v. *Motteux* is the original authority upon which all the other cases upon this subject have been founded. In that case the determination of a Court of Admiralty in *France* was held not conclusive against a warranty of neutrality. And there Lord *Mansfield* stated the difficulty to be, the not being able to collect the ground on which the *French* Court of Admiralty went, whether that of enemies' property or that of the papers being thrown overboard contrary to an *arrêt* of that country; and thinking that enough did not appear on the sentence to ascertain precisely upon what it was founded, and that the *French* Admiralty might have proceeded on the ground of the papers being thrown overboard, determined in favour of the Plaintiff on the ambiguity of the sentence. In that case Lord *Mansfield* was desirous of the parties agreeing that the *procès verbal* should be made a part of the case, because by referring to it the ambiguity of the sentence would be explained, as it set forth the ground of taking the ship to be an *arrêt* of *July* in the year 1778; and in the case of *Salloucci* v. *Woodmass*, *Park*, 362. Lord *Mansfield* laid it down as a general rule as to such sentences, that where no other cause appears, it must be presumed from the condemnation that it proceeded on the ground of property belonging to an enemy; and distinguished that case from *Bernardi* v. *Motteux*, as there a particular ground of confiscation appeared on the face of the sentence; and that it did not appear to be on the ground of enemies' property. That these decisions have had great weight in the courts of common law will not be wondered at, if it be recollected that they had the authority of Lord *Mansfield*, whose mind when he filled the office of Solicitor General had been particularly turned to the consideration of questions of prize, and who, according to the account of Sir *William Blackstone*, (*Comm.* vol. 3. p. 70.) attended and conducted all the decisions of the Cockpit during the whole of the war, which began in the year 1756, and whose masterly acquaintance with the law of nations was known and revered by every state of *Europe*. Subsequent to the decisions I have mentioned, the cases of *Geyer* v. *Aguilar*, *Christie* v. *Secretan*, *Pollard* v. *Bell*, *Bird* v. *Appleton*, and *Price* v. *Bell*, have been decided, in which the Court has acted on the principles laid down in the cases I have mentioned;

1803. LOTHIAN and Another v. HENDERSON and Another.

tioned; and though in some of those cases expressions may have been used, from whence it may have been supposed that the Court has distinguished between cases, where the foreign sentence has distinctly and directly founded their condemnation of a capture on its being enemies' property, and those where it only was to be collected from other parts of the proceedings, that such was the ground of decision, and that in such latter case the Court did not hold itself bound unless it approved of the reasons; yet I believe if the cases are attended to, and that which has been said by the different Judges is construed with reference to the points in the cases then before them, notwithstanding some generality of expression, it will not be found that they had any such distinction in their minds; and if the opinions of all the Judges in those cases is attended to, it will not appear that the Court adopted any such distinction. Having said thus much as to the principles upon which the cases have been decided, in which questions have arisen on the effect of sentences of foreign Courts by which ships have been condemned, it only remains to examine the sentence in this case in order to see whether it has not professed to condemn the ship *Catherine* as enemies' property; and if that is not distinctly stated to be the ground of the condemnation, whether that cannot be collected from other parts of the proceedings. And upon this point my opinion is, that the *Catherine* was condemned by the Tribunal of Commerce of *Nantz* for being the property of the enemies of the *French* Republic. That Court, af.er having laid out of their considerations various matters, which in their judgment ought not to weigh, and stating other things as the reasons of their determination, the last of which is, "that considering every ship declared enemy and good prize carries with it the confiscation of her cargo;" proceeds to declare the ship lawful prize; and as a consequence adjudges the cargo to be lawful prize; that is, with reference to the last reason it judges the cargo prize, because the ship had been declared an enemy; and then the sentence concludes with respect both to the ship and cargo, that the whole, from what that Court has been pleased to consider as an irregularity in the captain's papers, is to be deemed, that is, thought or judged to belong to the enemies of the *French* Republic; which terms, to my mind, most explicitly and distinctly mark the ground of condemnation to be that of enemies' property. This being so declared, any examination of the other parts of the proceedings, or the reasons of the sentence, cannot be gone into accord-

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ing to the principles of the ſeveral determinations in our Courts, which have never examined them but where they have been unable from the ambiguity of the adjudicating part of the ſentence to collect the ground on which it has been founded. For theſe reaſons, upon the points to which I have conceived your Lordſhips might expect me to advert, my opinion is, that the explanatory agreement or declaration does not ſhut out the effect of the ſentence of condemnation of the ſhip *Catherine*; and that the effect of that ſentence is concluſive in favour of the underwriters, that the warranty in the policy has not been complied with.

ROOKE, J. The queſtion propoſed by your Lordſhips ſuppoſes that the inſured have acted with perfect good faith; that the ſhip was truly an *American*, and had the uſual documents on board. At the time of the inſurance we muſt preſume that the inſured meant honeſtly, and that they believed that they could procure all the proper documents to prove the ſhip to be *American*. In the policy the *Catherine* is called an *American* ſhip. An agreement is afterwards entered into and ſigned by the underwriters to explain what they underſtood by the terms of the policy calling her an *American* ſhip. It is the agreement of the underwriters: it has their ſignature, and muſt be conſidered as expreſſed in their language, and conſequently if the expreſſion is in any reſpect equivocal, the conſtruction ought to be made favourably for the aſſured rather than for the underwriters. When this agreement was made, I muſt preſume (for I preſume that they have the common underſtanding of mercantile men) that the parties were aware, that in caſe of loſs by other perils than by capture or ſeizure, proof that the ſhip was properly documented according to all that was known in *America*, at the time when the ſhip ſailed, to have been required by *France* for that purpoſe, would be ſufficient to entitle the inſured to recover in our courts. They make no proviſion for loſſes by theſe means. They provide only for the events of capture or ſeizure. And in what terms do they provide? They do not ſay, in caſe of capture and condemnation we will not indemnify, for we ſhall conſider a ſentence of condemnation as concluſive to ſhew ſhe is not *American*. This would have put an end to all doubt. But knowing ſhe was liable to ſeizure or capture they declare, that in caſe of capture or ſeizure the aſſured before they claim for a loſs muſt produce proofs of the ſhip being an *American* bottom, and by bills of lading ſhew the tobacco to have been ſhipped upon account

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1803. LOTHIAN and Another v. HENDERSON and Another.

and risk of Messrs. *Henderson*, *Fergusson*, and *Gibson*, upon which the underwriters agree to settle by granting their bills at four months' date for the amount of their subscriptions, deducting the stipulated premium, in full dependance that the insured will use their best endeavours to recover the property, as for account of the shippers. The agreement is made with an express view to seizure or capture, and to these events only: it respects such seizure or capture as may afford an opportunity to the insured to endeavour to recover the property; and it supposes it possible that these endeavours may be unsuccessful; and no provision is made that the underwriters shall be excused, or that the assured shall refund in case these endeavours shall not procure a recovery of the property. It declares, however, that if the brokers produce proofs of the ship's being an *American* bottom, and shew by bills of lading that the tobacco was shipped on account and risk of the assured, that then the underwriters will settle. The mode of settlement is, I think, immaterial; whether by actual payment of money, or by granting bills at four months' date. The foundation of the claim of indemnity by the assured is the same, *viz.* that there has been a capture or seizure, and that proof has been produced that the ship is an *American* bottom. The whole doubt, then, arises on the construction of the word proof. Did the parties mean such proof as is satisfactory between man and man? such as was known, at the time the ship sailed, to have been required by *France* to shew her to be an *American* bottom? or did they mean such proof as, though technically conclusive in the *British* courts to shew her to have been condemned as enemies' property, yet is in reality contrary to truth and justice? They clearly have in their contemplation a case of capture or seizure, in consequence of which the assured may use their best endeavours to recover the property, and yet be unsuccessful. Now I cannot form to myself a case of seizure or capture in which the assured shall use their best endeavours to recover back the property, and be unsuccessful, except a case of condemnation. For if the ship should be seized and released, or taken and re-taken, the endeavours of the assured (if they used any) would be successful, and the indemnity would be of little importance; but if the ship should be seized and condemned, notwithstanding the endeavours of the assured, the assured would be entitled to recover as for a total loss. My opinion, therefore, is, that the agreement provides for the case of capture and condemnation, relying on the good faith of the assured

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that they will honeſtly uſe their beſt endeavours to recover the property. If ſo, I can never aſſent to ſet up the ſentence of condemnation in bar of a performance of the agreement. That would be to allow an exception *ejuſdem rei cujus petitur diſſolutio*: it would be to pervert the agreement from what I conceive to be the true ſenſe of it; and to break through an eſtabliſhed maxim of our law. The conſtruction I put on the word "proof" is ſuch proof as is ſatisfactory between man and man without regard to the event of condemnation; ſuch proof as muſt have been produced in caſe the ſhip had been loſt by fire or perils of the ſea; in ſhort, ſuch proof as by the terms of the queſtion propoſed by your Lordſhips is admitted to have been produced by the parties in this cauſe. Having regard therefore to the agreement of the 20th *April* 1797, I am of opinion, that if bills had been given by the underwriters and had remained in the hands of the aſſured after the ſentence of condemnation, the aſſured could have recovered againſt the underwriters in actions brought on ſuch bills, after and notwithſtanding ſuch ſentence of condemnation. But if I ſhould be thought wrong in the conſtruction I put on the agreement, and if your Lordſhips ſhould be of opinion that the proofs required by the parties are ſtrict technically legal proofs, in which the ſentence of condemnation is to be included, then I am of opinion, upon the authority of the ſeveral adjudged caſes from *Cornelius* v. *Hughes*, in the time of *Charles* the 2d, to the preſent time, and particularly the laſt caſe of *Geyer* v. *Aguilar*, (which I think to have been decided on the ſoundeſt principles of policy) that the ſentence of condemnation once admitted in evidence is concluſive to ſhew that this ſhip was *pro hâc vice* enemies' property, and conſequently not a neutral *American*, as by the warranty the aſſured undertook ſhe ſhould be.

THOMPSON, B. The deſcription of the ſhip *Catherine* in the policy as an *American* ſhip, is equivalent to an expreſs warranty that ſhe was *American*, and the aſſured therefore are bound to ſhew that the ſhip really did ſuſtain the character of an *American* in every reſpect, and as ſuch was entitled to the privileges of neutrality before they can recover againſt the underwriters. Poſſibly the explanatory agreement was occaſioned by a doubt whether under the warranty the tobacco muſt not be proved to be the property of *Henderſon* and Co.; or poſſibly by a doubt whether the warranty was not confined to the ſhip. At any rate, I do not think that it was the intention of the underwriters to preclude any ſpecies of

1803.

LOTHIAN and Another v. HENDERSON and Another.

proof either on their own part or on the part of the assured. Indeed it is observable, that no precise mode of proof is pointed out with respect to the property of the ship, though the evidence of the property in the tobacco is admitted to be drawn from the bills of lading. It does not appear to me that the reliance placed by the underwriters on the endeavours of the assured to recover the property as for account of the shippers, imports any thing more than the common clause to the same effect introduced into every policy of assurance: consequently it affords no satisfactory inference as to the meaning of the explanatory agreement. Now unless it could be made clearly to appear that the underwriters had it in contemplation to renounce the advantage to be derived to themselves from any species of proof whatsoever, and more particularly from that species of proof which is conclusive in their favour, I think they ought not to be deprived of the use of the sentence of condemnation of which they wish to avail themselves. With respect to the effect of the sentence of condemnation, if the underwriters are at liberty to avail themselves of it, it appears to me that there is little difficulty. It is now clearly established, that where there is a warranty of neutral property, and a condemnation of the property insured takes place in a Court of competent jurisdiction as enemies' property, that such condemnation is conclusive against the warranty of neutrality in our Courts. The cases in which foreign sentences have been held not to be conclusive against the warranties of neutrality, have been cases where the foreign Courts have clearly proceeded in their condemnation on the ground of some contravention of their own arbitrary rules, and in which the terms of the sentences have not contradicted the warranty of neutrality. The *French* sentence by which the *Catherine* was condemned, expressly decides that she was not neutral property. This case therefore appears to me to fall precisely within the case of *Geyer* v. *Aguilar*, 7 *T. R.* 681. A doubt has been intimated whether if the underwriters had actually given their bills before the arrival of the sentence of condemnation, they would have been liable to pay those bills after the arrival of the sentence. Supposing the bills not to have passed into other hands, it appears to me that the underwriters would not have been liable to the assured upon those bills after the arrival of the sentence, for the bills would have been given under a mistake of facts falsified by the sentence, and consequently would have been without consideration.

GROSE J. In anſwer to the queſtion put by your Lordſhips, Whether, under the circumſtances ſtated in the queſtion, regard being had to the legal meaning and effect of the ſaid policy, ſentence, and agreement of the 20th *April* 1797, the aſſured could have recovered againſt the underwriters in actions brought upon the ſaid bills? my humble opinion is that they might have ſo recovered. That opinion is founded upon the nature and legal effect of the tranſactions that have paſſed between the parties; and particularly the intent of thoſe parties apparent upon the face of the agreement. The tranſactions previous to and material to the conſideration of the agreement are, that in *March* 1797 the Reſpondents, merchants in *Glaſgow*, agents and attornies of Meſſrs. *Henderſon* and Co. merchants and partners in the State of *Virginia*, gave an order to Meſſrs. *Murdoch* and *M'Kenzie*, of *Glaſgow*, to make inſurance for Meſſrs. *Henderſon* and Co., citizens of the United States of *America*, on tobacco ſhipped on an *American* veſſel called the *Catherine*. A policy was effected, on the 8th *March* 1797, upon the goods and merchandiſes of and in the good ſhip or veſſel called the *Catherine*, an *American* veſſel, againſt the adventures and perils of the ſeas, and againſt men of war, enemies, pirates, takings at ſea, arreſts, and detentions of all kings, princes, and people. The voyage inſured was from the *Potomack* and *Patuxent* rivers to *Helvoetſluys*, from thence to *Rotterdam* or a port to the northward. Before the effecting this policy the ſhip ſailed with her cargo, on the 1ſt of *April*, from *Nottingham* in *Virginia*, and was captured in the voyage on the 17th of *May*, by a *French* privateer, and ſent into *France*. Between the date of the inſurance, and after the ſailing of the ſhip, and before the capture, *i. e.* on the 20th *April* 1797, doubts having ariſen how far, by the policy underwritten, there was a warranty of the property being *American*, and what was to be underſtood by ſuch warranty, the parties entered into the explanatory agreement, dated *Glaſgow*, 20th *April* 1797. Conſidering the terms of the agreement, the conſtruction of it may receive elucidation, and the intention of the parties be diſcovered, from the ſtate of things at that time exiſting in *Europe*, from the articles profeſſedly inſured, from the words uſed in the agreement, and from others that ſeem to have been ſtudiouſly omitted. Previous to the date of the policy and of this agreement a war had exiſted in *Europe* between this country and *France*, which made it convenient and deſirable to cauſe to be underwritten articles of different

1808.

LOTHIAN and Another v. HENDERSON and Another.

different sorts, belonging as well to foreigners as to *British* subjects, against the perils of the seas, fire, and against capture at sea, arrests, and detainments of all kings, princes, and people, barratry, and all other perils, losses, and misfortunes, that had or should come to the hurt, detriment, or damage of the goods or ship. Upon the insurance of foreigners it became material to know whether they were neutral or enemies, and warranties were entered into for the purpose of binding down the assured to proof of their ships and goods being neutral, and in confidence that, should they be such, and seized or captured, the owners would, in case of process by the captors in the Admiralty Courts praying condemnation, resist and prevent their being condemned as prize. The law upon these warranties compelled the assured in all cases to prove the warranty, and, whether the ship or cargo was lost by capture, or the perils of the sea, or fire, or barratry, if the warranty was not, as it is called, complied with, the assured, in case of a loss, either by storms or barratry, or capture, could not recover. And upon this subject, that is, warranty, there were different modes of proof; of the ship, by bills of sale, or evidence by whom built; of the goods, by bills of lading, or of both by a sentence of an Admiralty Court, to which, such Courts being supposed to be guided by the law of nations, the *comitas gentium* pays such respect as to deem its authority conclusive as to that which it determines as to the point of the property being neutral or hostile. And although, in my way of considering the question, it is not necessary to say whether such condemnation is conclusive, yet, as at present advised, I think it is; although I consider proof of the ship being built in a neutral country, at the expence of the assured or of property conveyed by bill of sale, to be a more satisfactory proof of the ownership. The less satisfactory proof in the minds of honest men, in which the law says one thing and the real fact may be different, is proof on capture or seizure, by condemnation in an Admiralty Court; for it might happen that a ship, though neutral, though built by an *American*, loaded by an *American* with his own property, might be captured by a *French* ship, taken to a *French* port, libelled in a *French* Admiralty Court, and might be condemned as enemies' property, not because it was enemies' property, but because the owners had not complied with some *French* edict unknown to them, upon failure of which that nation deemed the ship to be enemies' property. Such things have notoriously happened; that they have so must

 have

LOTHIAN and Another v. HENDERSON and Another.

have been known to *Americans*, *Swedes*, *Danes*, and every foreign ſtate, whoſe ſhips the *Engliſh* have inſured, and the *French* nation have ſeized; condemnation, therefore, became an unſatisfactory, though concluſive, mode of proof of a ſhip and goods being enemies' property. I ſay unſatisfactory, compared with the proof of building the ſhip or bill of ſale, and of the bill of lading of the goods; but ſuch condemnation could ſeldom be, except where the loſs was by capture or ſeizure, not where it was by fire or ſtorm. Looking, therefore, to the different proofs of neutrality, and of being enemies' property, the parties in this caſe ſit down and recite a doubt exiſting, whether there was a warranty, and what was to be underſtood by it, and declare what, under certain circumſtances, ſhall conſtitute proof ſufficient of the warranty. They were aware of the different modes by which a loſs might happen, by perils of the ſea, by fire, by barratry, and by capture or ſeizure; but they ſtipulate what ſhall be proof of the warranty in two given caſes only, that is, capture or ſeizure; leaving, in other caſes, to the courts of law to determine what the proof ſhall be; and they declare, that in caſe of capture or ſeizure, *Henderſon* and Co., before they claim for a loſs, muſt produce proof of the ſhip being an *American* bottom (this relates to the ſhip); and by bills of lading ſhew that the tobacco ſhall have been ſhipped on account and riſk of *Henderſon* and Co. (which relates to the goods). This is the only ſtipulated proof as to the goods. Upon proofs then produced of the ſhip being *American* bottom, and bills of lading ſhewing that the tobacco had been ſhipped on account and riſk of *Henderſon* and Co., what is to be the conſequence? The agreement is expreſs; "upon which we ſhall ſettle by granting our bills at four months' date for the amount of our ſubſcription, deducting the ſtipulated premium," *i. e.* upon proof of the ſhip being *American* bottom by bill of ſale, or other proof of it having been built in *America*; of the goods having been ſhipped on account and riſk of *Henderſon* and Co. by bills of lading; the loſs was immediately to be ſettled by bills at four months, which might be immediately negotiated, and upon which the money ſtipulated might be raiſed, deducting the diſcount. Let us obſerve, then, what next follows: "in full dependence that the inſured will uſe their beſt endeavours to recover the property as for account of the ſhippers;" *i. e.* that for the benefit of the underwriters they will libel in the Admiralty Court for reſtitution, and prevent condemnation. So that, having the ſubject of

1803.
LOTHIAN and Another v. HENDERSON and Another.

of condemnation in their view, and knowing what the effect and consequence of the condemnation would be, they do not stipulate that upon condemnation as enemies' property the money shall be returned, but upon capture or seizure (leaving out in failure of condemnation) the bills are to be given, and the insured, for the benefit of the underwriters, are to use their best endeavours to recover the property by preventing a condemnation. This seems to me to be the fair natural import of the words, and the intention was, that if the assured proved the ships to have been built in *America*, and the goods by bills of lading to have been shipped on the account and risk of the insured, the money was to be paid by bills, without any regard to a condemnation of any sort. That a condemnation might be had was known; the consequence of it was renounced; and, condemnation or no condemnation, the money was to be paid. *Cuilibet licet renuntiare juri pro se introducto.* If it had been the intention of the parties that in any case it should be returned, the agreement would have so stipulated; but it has not that stipulation; and therefore it seems to me to be neither within the letter of the agreement nor the intention of the parties. For, had such been the intention of the parties, when they stipulated what was to be done by each, and in such stipulation manifestly having in view the possibility of condemnation, they would, nay, I think they must have added, "and if condemned as enemies' property, the money received to be returned to the underwriters." Upon these grounds, looking into the state of things at the time of the agreement, reading the words of it in the plain, known sense, adding nothing, leaving nothing out, it seems to me, under the circumstances stated in the question, that the assured have, on their parts, complied with the terms of the agreement, *i. e.* they have produced proof of the ship being an *American* bottom, and of the goods being shipped on account and risk of *Henderson* and Co.; and having so done, they are entitled to be paid by bills. And although those bills remained in their hands until after the sentence of condemnation, yet such sentence could not affect their right to the money, as such right is made by the agreement to depend, not on condemnation of the property, but on stipulated proof of the ship being an *American* bottom, and the goods being shipped on account of *Henderson* and Co.; which proof, by the question, is admitted to have existed. The inference from these words, and this construction, is, that when the underwriters underwrote the policy all that they expected

expected the assured to warrant was, that the ship was *American* bottom, and the goods shipped on account of *Henderson* and Co.; of this, when they signed the agreement in question, they stipulate that the assured shall produce proofs, *viz.* as to the goods expressly by bills of lading (and this of the goods is the only stipulated proof, and thereby negatives all other proof and discussion upon it, and makes this proof conclusive); as to the ship's being *American* bottom, by any competent evidence; such evidence is admitted to have been given, because the fact which is the conclusion is expressly stated. On these grounds I am of opinion that the bills remaining in the hands of the assured after the sentence of condemnation, the assured, notwithstanding such sentence, would have had a right to recover the sums mentioned in those bills; and that the question put by your Lordships to the Judges, should be answered in the affirmative.

Heath, J. The agreement of the 20th of *April* 1797, to which the question refers, is inaccurately drawn; yet I think that the intention of the parties is manifest, and I have no doubt concerning the legal construction of the instrument. The object of the parties was to ascertain the neutrality of the ship in the event of capture or seizure, by the medium of such proof as would be sufficient in the case of a loss by the perils of the seas. The manifest injustice practised by the *French* Courts of prize at the date of this agreement was so public and notorious, and was the subject of so many suits in this country, that I presume we may judicially take notice of it. If so, the meaning of the agreement, as clearly and manifestly may be collected from the terms of it, was to indemnify the assured against the iniquity of these sentences, and for the underwriters, in consideration of the high premium of 10 guineas *per cent.*, to take that risk on themselves; for the premium was a high war premium. But however clear this may be to my apprehension, yet as several other Judges entertain different sentiments on this subject, I shall proceed to examine the legal effect of this instrument, and to ascertain the principles which ought to govern the construction of it. In every executory contract where on a given event a sum of money is agreed to be paid by one party to the other party, it is competent to them to agree to ascertain such event by any certain medium of proof. The making such proof is a condition precedent in covenant, or a sufficient condition in *assumpsit* to entitle the party claiming the money to recover it. It was so decided in covenant in the case of *Wood v. Worsley*, 2 *H. Bl.*

1803.
LOTHIAN and Another v. HENDERSON and Another.

574. (*a*), where the certificate signed by the minister of the parish, by the churchwardens, and some of the most respectable inhabitants, was made necessary; for want of which the plaintiffs could not recover. It was so decided in *assumpsit* in the case of *Amic* v. *Andrews*, 1 *Mo.* 166., where the Defendant agreed, that if the Plaintiff would bring two witnesses, who upon their oaths should declare that the Defendant's father was indebted to the Plaintiff, and promised to pay, he the Defendant promised to pay the debt. It was held a good consideration, and the Plaintiff on proving that he had adduced such proof recovered. I am well aware that in the case last cited the question turned on the consideration; but that was the technical mode of determining the point; it was substantially the same as a condition precedent in covenant, and referable to the principle above stated. In the case of a valued policy, it is agreed that the production of the policy shall be proof of the value. The proof which shall be made in such cases as I have stated is conclusive to the other party, and not to be controverted but on the ground of fraud which violates every contract. Suppose an action of *assumpsit* brought on this agreement. It has been asked, Whether, after the bills were given or the money paid, payment of the bills could be resisted or the money recovered on proof of the condemnation? I answer, by no means. The agreement is fair, the money is paid in pursuance of it, and there is no mistake or fraud imputable. If this be admitted, then the bills are equivalent to payment. The time when the proof is to be adduced forms a material part of this agreement. The assured is entitled by the terms of it to recover his loss, on producing proof before the final condemnation. By proof, the parties must mean such as is required in the case of a loss by the perils of the sea. This is an answer to the argument used at the bar, that proof to be given on one side necessarily admits proof on the other side. A question has been made and discussed, *viz.* What would have been the consequence if the news of the capture and of the condemnation had arrived at the same moment? The fact supposed does not fall within the question proposed to us; it was not in the contemplation of the parties, and it does not fall within the scope of the agreement; for the agreement pre-supposes that at the time of making the proof and of delivering the bills there was a possibility of the ship being restored. It would be strange to say, that proof means proof generally in respect to the ship, but

(*a*) 6 *T. R.* 710, same case in Error.

proof by the bills of lading is to be restrained to the mere production of the instrument.

HOTHAM, B. The question put to us by your Lordships seems to me to turn on the agreement stated of the 20th of *April* 1797, and the construction that ought to be put upon it. Soon after the policy had been underwritten, to obviate some doubts that had arisen on the terms of it, the agreement in question was proposed by the brokers, and was signed by the underwriters. To my apprehension it is clear that both parties intended to consider the capture or seizure, if either should happen, as a total loss. But it was stipulated, that before the insured were to claim for such loss, they should be bound to produce proofs that the ship was an *American* bottom, and shew by bills of lading that the tobacco was really shipped on account and at the risk of the insured, upon which the underwriters engaged to settle by granting bills at four months' date. This agreement being thus entered into, it could not but be intended that it should have so direct a reference to the policy itself, and be received as such an explanation of it, that the two instruments should be auxiliary to each other; both together expressing and producing the true meaning, understanding, and undertaking of the parties. Consider then the instrument itself. There is nothing in the nature nor in the form of a policy that forbids the contracting parties from entering into any agreement that may more fully explain its true meaning and effect. It tends to no danger, it opens to no fraud. On the contrary, it conduces directly to justice by declaring what was really intended, though perhaps briefly and ambiguously expressed in the policy itself. What was the case here? The terms of the policy were thought, on consideration, to leave the matter too loose. Doubts were entertained on the future explanation of it. The warranty was not in litigation: before it was (and, indeed, that it might never be the cause of any), the brokers and the underwriters met, and came to a full and clear understanding of what they each undertook to do. The owners undertook that they should produce proofs of the ship and goods being *American*. This was all that it was incumbent on them to do. On the other side the underwriters undertook, on the assured having done this, to settle with them by bills at four months. Have these things, then, respectively been done? The question proposed to us by your Lordships takes it as granted that the ship had every document on board to prove that she was *Ame-*

1803.
LOTHIAN and Another v. HENDERSON and Another.

rican, and that the tobacco was alſo *American* property. The required proof, therefore, cannot but be taken as capable of being furniſhed to the underwriters. What was there then left for them to do? Nothing but to ſettle by granting bills at four months. Did the underwriters, when they ſigned the agreement, look to any thing elſe? Not a word was ſaid of any ſentence of condemnation: and yet it is impoſſible that they ſhould have overlooked ſuch an event; becauſe it is not to be imagined that any underwriters ſhould have been ſo ignorant of the ſtate of *Europe* at that time, as not to have foreſeen the probability of a capture or ſeizure; which, indeed, the agreement on the face of it points at as an event that was not improbable. If they had it not in their contemplation, it is, in my opinion, totally impoſſible to account for the expreſſion in the agreement, that the underwriters would grant bills for the amount of their ſubſcriptions, "in full dependance that the inſured would uſe their beſt endeavours to recover the property as for account of the ſhippers." Stronger words could not be uſed to denote what was then in the contemplation of both parties; namely, the event of a ſeizure or capture. With whom were the inſured to uſe their beſt endeavours to recover the property but againſt the ſeizing enemy? It is clear too by thoſe words that the underwriters were to pay after the capture, and before the ſhip was known to be condemned. It ſeems to me as if they meant altogether to avoid all conſideration of the effect of a foreign ſentence. In fact they were not to wait for any ſentence. It was not intended that they ſhould; for it was very poſſible that many months might have elapſed before any ſentence would be pronounced: whereas it was agreed that on proof being made the bills were at all events to be given at four months by the underwriters. If the proof produced ſatisfied them, then the door was to be ſhut from that moment againſt all further queſtions or litigations. The agreement ſeems to ſay, as explicitly as words can expreſs, that if a capture happen, let the event be what it may, let the ſhip be condemned or not, it ſhall matter nothing as between us, provided only the ſhip and goods are in truth *American*. Having made themſelves parties to this agreement, the underwriters can, neither in point of law, nor as honeſt men, reject that proof now, which by their own agreement they had ſtipulated to accept as ſatisfactory. On this ſhort ground my opinion reſts. I ſhall, therefore, add but a ſingle word on the other points that were principally re-

lied on in the argument; namely, first, that the contract ought to be deemed null and void from its dangerous policy. With respect to that I am of opinion that its political danger cannot authorize us as judges to pronounce it void. That is a consideration that must rest with the Legislature. With respect to the other important point, how far a foreign sentence, under circumstances like the present, shall, in a collateral question between other parties, be conclusive in our courts, I need only say, in concurrence with so many of my Brethren, that such a multitude of cases have so settled the law on that subject, that it is now much too late to disturb them. As a general proposition, a foreign sentence of condemnation, pronouncing ship and goods to be enemies' property, would be conclusive in our courts. But, construing the agreement in the case before us as I do, as being expressive of the true intent and meaning of all the parties to it, my answer to the present question proposed to us by your Lordships, must be in the affirmative; notwithstanding the foreign sentence, which, but for the agreement in question, would be conclusive evidence in our courts.

MACDONALD, Ch. B. The parties to this contract of indemnity having doubted whether the ship *Catherine* had been warranted neutral with sufficient certainty, being merely denominated in the policy an *American* ship, and having also observed that there was not any warranty that the tobacco on board was the property of *Henderson* and Co., and shipped on their account and at their risk, came to a resolution of reducing into writing the sense in which this policy had been understood by all the parties to it. The explanatory writing which they entered into for that purpose states, that as to two of the risks, namely, capture and seizure, in order to ground a claim upon the underwriters it shall be necessary, with respect to the ship, to produce proofs generally of her being an *American* bottom; and, with respect to the tobacco, to shew that it had been shipped on account of *Henderson* and Co., by producing specifically the bills of lading, and bills of lading only. By this I understand them to declare that the assured were considered as having warranted the ship neutral, and now to warrant the goods to be the property of *Henderson* and Co. Having thus declared what the warranty was and is to be, the explanatory paper proceeds to state what was to be understood by such warranty; this word, " understood," I conceive, from the context, to mean how that neutrality of the ship and property in the goods were to be verified

1803.

LOTHIAN and Another v. HENDERSON and Another.

verified to the underwriters, and what ſhould be the conſequence of its being verified in the manner agreed upon. With reſpect to the ſhip, no ſpecific documents are pointed out, as required, to prove her neutrality; they content themſelves with the general word proofs. With reſpect to the tobacco, they do ſpecify the requiſite evidence to be bills of lading. It has been contended at the bar, that with reſpect to the ſhip the word "proof" (which I conceive to mean the ſame as evidence in this paper), ſo far from excluding the evidence which might ariſe from a ſentence of condemnation, as negativing the warranty of neutrality, does, on the contrary, include the production of that evidence on the part of the underwriters. As to this the queſtion will be, Whether from the whole context of this paper it does not appear that the word "proofs" was uſed by the parties in a more confined ſenſe; which, to me, appears to have been the caſe. It ſeems to have been the intention of theſe parties, that at the ſame time that the property in the tobacco might be ſhewn to be that of *Henderſon* and Co. by the production of bills of lading, the neutrality of the ſhip ſhould be ſhewn by proofs or evidence. Now the property in the goods might be ſhewn by production of the bills of lading on the part of the aſſured before they claimed as for a loſs, and upon ſuch production the underwriters undertook to ſettle. This expreſſion imports that they would conſider that evidence as concluſive, inaſmuch as undertaking to ſettle means undertaking to pay. When the bills of lading were thus to be produced, and a claim made, it might well have happened that no ſentence of condemnation had been pronounced, nor, if pronounced, been heard of; yet they undertake to ſettle or pay. Such is the evidence on which the underwriters ſtipulate to pay with reſpect to the tobacco. In like manner, as the documents which were to be produced, grounding the claim of indemnity for the capture of the tobacco, might have been exhibited to the underwriters before a ſentence of condemnation was pronounced, or known to have been pronounced, ſo might the proofs of the neutrality of the ſhip. Theſe latter proofs muſt, therefore, mean ſuch evidence as the aſſured had it in their power to produce before a ſentence of condemnation had been pronounced, or was known to exiſt; namely, all ſuch as *American* neutral ſhips muſt have on board according to the general law of nations, or ſpecial treaties with *France*. The evidence, then, ſpecifically agreed upon, as grounding a claim of indemnity with reſpect

1803.

Lothian and Another v. Henderson and Another.

ſpect to the goods, was ſolely that which would prove the fact of their having been ſhipped on account and at the riſk of neutral owners, and no future time was looked to by the parties, nor any future event which might afford conſtructive evidence, proving them not to be the goods of neutrals. The proofs, then, which were in contemplation of the parties to this explanatory paper, muſt have been ſuch, with reſpect to the ſhip as well as the goods, as the aſſured could produce if they had claimed before a ſentence condemning the ſhip was known to exiſt; namely, thoſe with which your Lordſhips' queſtion directs us to aſſume in argument, this ſhip to have been furniſhed to prove her neutrality in the fulleſt extent independent of a ſentence of condemnation. Parties who are explaining their own meaning in a policy of aſſurance cannot be ſuppoſed to be ignorant of the courſe of proceeding in the event of capture; they muſt know that the caſe of a captured ſhip muſt be ſubmitted to a tribunal profeſſing to adminiſter the law of nations in the country of the capturing ſhip, and that a ſentence of condemnation might be pronounced. In the preſent caſe, it appears that they had this event directly in their view; for the agreement ſtipulates that the underwriters will ſettle, in full dependence that the inſured will uſe their beſt endeavours to recover the property as for account of the ſhippers; and the only riſks ſtated in the agreement are capture and ſeizure. This muſt mean after capture and while the ſuit was depending; for, after ſentence pronounced and affirmed, that the ſhip and cargo were to be deemed the ſhip and goods of enemies, every expectation of ſucceſsful endeavours to recover the goods muſt have been in vain. This ſeems to indicate that the true meaning of the parties was, to conſider the capture or ſeizure as a total loſs between themſelves, for which the aſſured ſhould be indemniſied upon the underwriters' being furniſhed with thoſe documents of neutrality, without which ſhips cannot profit by their neutrality, and bills of lading ſhewing the property in the tobacco to be that of the perſons named in the policy. This further appears from the mode in which the ſettlement or payment was to be made; and it ſhould ſeem that it was to take place immediately upon the requiſite production being made. Payment was agreed to be made by the underwriters giving negotiable ſecurities, to the amount of their ſubſcriptions, to the aſſured,

1803. Lothian and Another v. Henderson and Another.

at four months' date. The sentence of condemnation might not have taken place till after the expiration of the four months, or the time when the bills were negotiated. If the underwriters had any reserved reliance on the effect of a future sentence of condemnation making its appearance, they must be supposed to have intended to expose themselves to all the difficulties which would have arisen had those bills been actually given and sent into circulation. The *bonâ fide* holder, by indorsement of the assured when the bills were due, would have had a right to recover upon them. The underwriters must then have had recourse to the assured, to whom they gave those bills in their own wrong, offering a return of premium. It is difficult to imagine the parties to this explanatory paper could intend to expose themselves to those difficulties into which their agreement might have brought them. The undertaking to give negotiable securities seems inconsistent with any other motive than the final adjustment of the claims of these parties, the one upon the other, except the postponed payment. The parties have made a law for themselves, by which they must abide; and that law has been conformed to on the part of the assured. With respect to the effect of those unjust sentences of the foreign tribunals, although I might have hesitated in concurring with some of the cases, it is now too late to encourage any doubts, as they have been acted upon to a very great amount.

After the learned Judges had thus delivered their opinions, the Lord Chancellor (Lord ELDON) spoke to the following effect:

In the opinion which I shall now deliver to the House upon this case, I am enabled to state that I have the concurrence of Lord *Ellenborough* (a), who is prevented from personally expressing the same by the duties of his office. When this case first came before the House, many doubts were suggested, not only from the peculiar circumstances of the policy in question, connected as it is with the writing annexed, and whether the decision of the House ought or ought not to be governed by that declaratory agreement, but also as to the true construction of the *French* sentence of condemnation, and how far in suits of this kind such sentences are at all admissible in evidence. Taking all these points into their consideration, the

(a) His Lordship was sitting at *Guildhall*.

House

1803.
LOTHIAN and Another v. HENDERSON and Another.

House deemed it right to summon the learned Judges to their assistance. After the opinions delivered by the learned Judges little need be said on the admissibility and effect of foreign sentences condemning on the ground of the property belonging to an enemy. The practice of receiving those sentences as conclusive evidence for collateral purposes, and not merely in suits between the identical parties in the foreign courts, may possibly have first obtained in those cases where the Plaintiff himself produced the sentence in order to prove the loss; and I have reason to believe that the practice of allowing the underwriters to make use of them was founded on a notion, that every man might come into a Court of Admiralty *pro interesse suo*, and that all mankind, therefore, were virtually parties to such proceedings. That notion, I apprehend and am informed, is a mistaken notion, and that the assured in a policy of assurance, with a warranty of neutral character, could not be admitted parties to the proceedings in a Court of Admiralty for such collateral purposes as those for which they must of course claim to be admitted. It does not become me, however, for that reason, now to impugn a practice acted upon for so long a series of years, and that by men whose judicial character must ever be looked up to with reverence in this country. I well know also, how much property has been affected by this principle, and how much more may now be afloat on the faith of that long train of decisions in *Westminster-Hall*, by which the principle in question has been sanctioned. There is, indeed, another class of cases arising out of foreign sentences, in which the conduct of the *French* Courts, regulated as it has been by the ordinances of that country, has met with no small degree of reprobation, and where the Judges of our Courts have held, that unless the adjudication by which the property in question is condemned be expressly declared to proceed on the ground of the property belonging to enemies, they are at liberty to examine the propriety of such sentence. Of that class of cases I will only say, that they have not yet, from their antiquity, acquired that stability which can operate to preclude us from fully examining the principles upon which they have proceeded. In the event of such examination taking place, the question would be, Whether such sentences of condemnation must not be presumed to

1803.

LOTHIAN and Another v. HENDERSON and Another.

have been founded on the only legitimate ground on which they can be founded, *viz.* the property not being neutral but hostile? and, Whether we are ever at liberty to say that the decisions of these Courts are not consistent with the law of nations? I think I should feel myself under great difficulty, if called upon, to admit the authority of some of the decisions upon these sentences. In the present case, giving effect to the explanatory agreement, and considering it as part of the contract, it seems to me impossible to contend that the underwriters undertook to receive proofs of the property being *American* only in case it was not condemned as hostile by a *French* Court, or that the assured undertook that no such event should happen. The intention of the parties seems to have been to explain themselves in this way, *viz.* that if there was a warranty of *American* property in the policy, yet that it should not be so construed as to preclude the assured, in case of a loss, from proving the ship and property to be *American*, even though a *French* sentence should condemn them as not being *American*. If this be not the legal effect of the agreement, I have not as yet been able to learn what effect the agreement is to have. Considering that in case of capture, that capture might either be followed by condemnation or acquittal, the underwriters agree that, without regard to the consequences of that event, they will, on the proofs alluded to being produced, pay within a definite period. Those proofs are to satisfy the underwriters of two points, *viz.* that the ship was an *American* bottom, and that the cargo was shipped on account and risk of Messrs. *Henderson*, *Fergusson*, and *Gibson*. It is observable also, that on the latter point the only proof required was the bills of lading; whereas, if the assured are, notwithstanding that agreement, to remain under all the legal difficulties to which they would have been exposed if no such agreement had been entered into, we must recollect that the bills of lading, if objected to, would not at law be proof of the fact, which, under this agreement, they are brought forward to establish. We must suppose the parties to have been aware that the mere act of capture might or might not entitle the assured to recover, according as the property should be treated in the *French* Court of Admiralty; notwithstanding which the underwriters agree to pay; without abiding the judgment of the *French* Court upon the question, Whether the property was *American* or

 not?

not? The explanatory agreement, therefore, appears to me to contemplate an adjustment not subject to the same consequences to which every other adjustment is subject; and, I will add, that if the news of the capture had been accompanied by the very sentence on which the underwriters now rest their defence, I think they must, nevertheless, have paid the loss. If the House should adopt this course of reasoning, it will be unnecessary to decide the other points agitated in this case.

Lord ALVANLEY (Ch. J. of the Common Pleas). After the long series of cases in *Westminster-Hall*, in which foreign sentences have been received for the same purposes for which the *French* sentence in this case is now set up, and the long period of time during which those cases have been acted on by the commercial part of this country, and acquiesced in by the legal part of the community, I cannot admit that it is still open to this House to decide that foreign sentences are not admissible evidence in suits between the assured and the underwriters, in order to falsify the warranty of neutrality. Nor do I feel that opinion shaken by the consideration that the point has never yet received the express decision of this House. At this late period, such a decision upon that point as the Respondents now contend for, might almost induce the merchants of *London* to shut the doors of *Guildhall* against the Judges. It gives me, therefore, great satisfaction to find, that on this point there is no difference of opinion entertained. Nor has any person a right to complain. It being once known that such is the law respecting foreign sentences, those who do not choose to subject themselves to the caprice of a *French* Court may stipulate in the policy that the sentence of a *French* Court shall not be adduced in evidence against their claim. When this case was first argued, I entertained considerable doubts respecting the effect to be given to the explanatory agreement; and I could not at that time bring myself to think that the assured were thereby relieved from the difficulty in which they would otherwise be placed by the *French* sentence of condemnation. I now concur entirely with my Lord Chancellor and those of the Judges who think that on that agreement alone the present case may be decided. The law is now perfectly clear, that a warranty of *American* ship includes in it a warranty of the ship having on board

1803.

Lothian and Another v. Henderson and Another.

every document with which an *American* ſhip ought to be furniſhed. It ſeems as if the parties to the policy effected by the Reſpondents were not aware of this circumſtance when the policy was effected, and therefore they afterwards procured the explanatory agreement from the Appellants. Such appears to me the true conſtruction of that agreement. On the conſtruction of foreign ſentences much uncertainty has prevailed in our Courts; but the doctrine laid down in the caſe of *Kindersley* v. *Chaſe* appears to me beſt calculated to do away that uncertainty.

The Houſe, on the motion of the Lord Chancellor, affirmed the Interlocutors of the Lord Ordinary and the Court of Seſſion.

END OF TRINITY TERM.

CASES

ARGUED and DETERMINED

IN THE

Court of COMMON PLEAS,

IN

Michaelmas Term,

In the Forty-fourth Year of the Reign of GEORGE III.

1803.

TAYLOR *v.* HARRIS.

Nov. 7th

If a Defendant die on the night before the trial of a cause at the Sittings in term, a verdict obtained in such cause, and the judgment entered up thereon, will be set aside upon application to the Court.

IN this case notice of trial having been given for the first Sittings at *Westminster* in last *Easter* term, was afterwards countermanded to the second Sittings in the same term, which was on the 6th of *May*. The Defendant died at eleven o'clock at night on the 5th of *May*. On the 6th the cause was called on, and a verdict passed for the Plaintiff, upon which verdict judgment was afterwards signed; but before the signing thereof notice of the Defendant's death was given by the Defendant's attorney.

A rule *nisi* having been obtained on a former day for setting aside this judgment,

Best Serjt. shewed cause. Had this been the case of a trial at *nisi prius*, it could not have been disputed that a verdict, taken after the death of the party, unless that death happened before the first day of the Sittings, would be good. Indeed that precise point was decided in *Jacobs* v. *Minicovi*, 7 *T. R.* 31. It remains then to be considered how far Sittings in term differ from Sittings at *nisi prius*. Now it may be observed, that the day of the Sittings in term is part

1803.
TAYLOR

of the term, and as such is referable to the first day of the term. The Defendant therefore, in this case, not having died until after the first day in term, the judgment is regular.

Lord ALVANLEY Ch. J. With respect to the case of *Jacobs* v. *Miniconi*, it is to be remembered that the cause there might have been tried at any period after it had once been entered in the Judge's cause paper: and nothing but the multiplicity of business prevented it from being tried on the first day of the Sittings. But the Sittings in term neither commence with the term, nor are any part of the term; they are appointed at the discretion of the Chief Justice; and if a cause, from never having been entered in the cause paper, could not possibly have been tried until after the death of the Defendant, a verdict obtained after his death cannot stand. Indeed the *postea* is made up as of the very day on which the cause was tried, whereas in the case of trials after term the *postea* is made up as of the first day of the Sittings.

ROOKE and CHAMBRE Js. concurring,

Rule absolute.

Nov. 19th.

PILLOP *v.* SEXTON.

A lunatic may be brought up by *habeas corpus* from *St. Luke's* Hospital to be surrendered in discharge of his bail.

CLAYTON Serjt. having on a former day obtained an *habeas corpus* directed to the keeper of *Saint Luke's* Hospital, ordering him to bring up a lunatic for the purpose of being rendered in discharge of his bail, he on this day mentioned, that in obedience to the *habeas corpus*, the keeper of the hospital attended with the lunatic, and also the warden of the *Fleet*, to take him into custody.

Accordingly the lunatic was brought into court, and surrendered into the custody of the warden of the *Fleet* (a).

(a) Vide *Steel* v. *Allan*, ante, vol. 2. p. 362. and p. 437. with the cases there cited.

6th.

SMITH *v.* YOUNGER.

In an affidavit to hold to bail the addition of "manufacturer" to the Deponent's name is sufficient.

IN an affidavit to hold to bail, the Deponent described himself as *James Smith* of *Wapping* in the county of *Middlesex*, manufacturer.

Lens Serjt. now moved for a rule to shew cause why a common appearance should not be entered, on the ground of the insufficiency

1803.

SMITH v. YOUNGER.

ciency of this description, contending that the addition of manufacturer was too vague, and would vitiate either an indictment or an original writ.

But *The Court* thought the addition sufficient in an affidavit to hold to bail.

Lens took nothing by his motion.

OSBORN *v.* GOUGH.

Nov. 26th

A notice of action to a magistrate under 24 G. 2. c. 44. *s.* 1. indorsed with the name of the Plaintiff's attorney, and the words "of *Birmingham*" as describing the place of his abode, held sufficient.

THIS was an action brought against the Defendant as a magistrate of the county of *Stafford*, for maliciously refusing to accept sureties for the Defendant's appearance at the Quarter Sessions to answer to a charge of a misdemeanor. At the trial before *Lawrence* J. at the last Assizes for the county of *Stafford*, a preliminary objection was taken to the notice of action delivered to the Defendant under the 24 *Geo.* 2. *c.* 44. *s.* 1. as not describing with sufficient particularity the residence of the attorney, which by that act is required to be indorsed on the notice. The description was "*William Spurrier* of *Birmingham* in the county of *Warwick*, attorney for the within-named *William Gough*." The learned Judge refused to nonsuit the Plaintiff, and the cause having proceeded, a verdict was found for the Plaintiff, with 500*l.* damages.

A rule *nisi* having been obtained upon a former day for setting aside this verdict on the ground of the objection taken at the trial,

Shepherd and *Onslow* Serjts. now shewed cause; and in the first place produced an affidavit, the object of which was to shew that the residence of *Spurrier* was well known both to the Defendant and his attorney before the commencement of the action. They then contended, that the notice was sufficiently particular according both to the spirit and letter of the act, the words of which are, "on the back of which notice shall be indorsed the name of such "attorney or agent, together with the place of his abode." They admitted that *Middlesex* or *London* would be an insufficient description of the residence of an attorney, because under those names are comprised many districts; whereas in *Birmingham* there was but one parish, although there were many streets; and they urged that a letter addressed to him by the description in the notice would undoubtedly have found him. They observed, that a case of *Fergusson* v. *Addington*, which had been mentioned to Mr.

 Justice

1803. Osborn v. Gough.

Justice *Lawrence* at the trial in support of the objection, had been incorrectly stated; for the notice to the Defendant there, who was sued as a magistrate, was said to have been indorsed with the names of the Plaintiffs' attornies, and "*Essex-street*," as the place of their residence, which Lord *Kenyon* held to be an insufficient notice; whereas in truth the notice was only indorsed with the names of the attornies, and no place of residence whatsoever was added. They relied on the case of *Wood and Others* v. *Folliott* (a), *T.* 26 *Geo.*

(a) *Wood and Others* v. *Folliott*, *C. B. Tr.* 1786.—Motion for a new trial in an action against officers of excise for seizing a vessel belonging to the Plaintiff. By 23 *G.* 3. *c* 70. *s.* 30. no writ shall be sued against, nor a copy of any process served upon, any officer of excise or person acting by his order, or in his aid, for any thing done in execution of their office, until one calendar month next after notice in writing shall have been delivered to him, or left at the usual place of his abode, by the attorney or agent for the party who intends to sue, &c. in which shall be clearly and explicitly contained the cause of action, the name and place of abode of the person who is to bring such action, and the name and place of abode of the said attorney or agent.

The notice given in this case was as follows: "To Mr. *Dan. Folliott*, commander of His Majesty's cutter *Baracuta*. You having lately seized and taken a certain sloop or vessel called the *Antigua Packet*, the property of *Wm. Wood* of *Rotherhithe*, in the county of *Surry*, merchant, *Alexander Wood*, late of the same place, mariner, and *Osborn Deverson*, late of the same place, mariner, together with her cargo, &c.

"*Donne* and *Cox*, *Furnival's Inn*, attorney "for the said *W. W.*, *A. W.*, and *O. D.*"

This cause was tried at the last Spring Assizes at *Launceston*, before Mr. Baron *Hotham*, who was of opinion that the notice was insufficient.

Mr. Serjt. *Rooke*, in support of the nonsuit, said, that this was a joint action by several, and one only is described at all. The reason of requiring a notice is, that Defendant may have an opportunity of tendering amends. If any one had released, it would have done. The notice here is insufficient as to any of the Plaintiffs. Though the Court should hold the description of the first to be sufficient, yet that of the others is clearly bad. The first is of *Rotherhithe* in the county of *Surry*. I have an affidavit, stating that there are 16 streets in *Rotherhithe*. It is no more than saying of *York*. Notice of bail so described would be bad. As to the others, "late of *Rotherhithe*" is no description at all of the party's place of abode. This last description is copied from the statute of Additions, which requires the addition to be "of where they be, or were resident." This case is not new. On 24 *G.* 2. *c.* 44. a notice to justices is required before any action can be brought against them. In *Strickland* v. *Ward*, at *Winton*, before Mr. J. *Yates*, the action was assault and false imprisonment, for committing a man returning to the parish from whence he had removed. The notice was of an action on the case, whereas the action brought was trespass *vi et armis*. Mr. J. *Yates* held the notice insufficient, and not conformable to the words of the statute. He would presume the Justice acted well till the contrary was proved; and he could not blame a justice who, knowing himself to be troubled with an unjust action, should lay hold of this or any other trifling advantage to nonsuit a Plaintiff. He also cited *Taylor* and *Fenwick*, *B. R. M.* 1782. In the present case, the truth is, that one of the Plaintiffs lived at *Newington*, and the Defendant could not find the others.

Mr. Serjt. *Grose*, in support of the rule. He mentioned the case of *Strickland* and *Ward*, on which Lord *Loughborough* said, would it not have been enough to have said "an action," and was not the rest surplusage? [*Gould* J. All that the statute says is—the cause of action.] Mr. Serjt. *Grose*. They might

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1803.
OSBORN v. GOUGH.

26 *Geo.* 3. in this Court, and observed that the case of *Taylor* v. *Fenwick* (*a*), cited 7 *T. R.* 635., was perfectly distinguishable from the present, the notice in that case having been signed by the attorney thus, "Given under my hand at *Durham*," which conveyed no intelligence of his place of residence.

Williams and *Lens* Serjts. in support of the rule observed, that the stat. 24 *Geo.* 2. *c.* 44. had been very rigidly construed by the courts, as appeared from the case of *Lovelace* v. *Curry*, 7 *T. R.* 631. where it was determined that it was not sufficient to state the cause of action in the notice without specifying what particular writ or process was intended to be sued out; that if a particular description of the attorney's residence was required by the act of parliament, it was no answer to the objection to say that his residence was known; that the town of *Birmingham* was a place of great magnitude, containing a variety of streets, and 60,000 inhabitants; and that the object of the statute was to enable the Defendant, without difficulty or loss of time, to find out the attorney and tender amends, and

as well have objected to the number of the stair-case in *Furnival's Inn* not being mentioned, where the attorney lives.

Lord *Loughborough* C. J. I think the notice is sufficient, and that it answers all the purposes of the act. The intent of it was that the party should have an opportunity of tendering amends. This is an action by partners. The description of the first is fully sufficient. A letter by the post would have found them; so would a porter. The case of bail is different, on account of the time the Plaintiff has to inquire. I do not think that either of the cases cited apply, supposing them to be well decided. As to the second objection, if the notice is not sufficient, a house of trade with partners abroad could bring no action.

Gould J. I am of the same opinion; it only requires reasonable information. The case of bail is the established practice of the Court. This act requires two different modes of information; the residence of the attorney and the Plaintiffs.

Heath J. I think the notice is sufficiently clear and explicit within the meaning of the act. Rule absolute.

(*a*) *M.* 23 *Geo.* 3. *Taylor and Fenwick*, *B. R.* tried at *Durham*.

This was an action against a justice of the peace, founded on a warrant granted by the Defendant on a conviction under the militia act.

At the trial it was objected that the notice was insufficient, for that the statute of 24 *G.* 2. *c.* 44. *s.* 1. requires that the attorney or agent's name must be indorsed on the back of it, together with the place of his abode. The notice in the present case concluded thus: "Given under my hand at *Durham*, the 11th day of, *&c.* *Richard Ratcliffe*, attorney for, *&c.*"

Mr. *Wallace* said, the reason of the act requiring this was that the party might make a tender of amends. The act does not require it to be signed by the attorney. If he had indorsed it "*Richard Ratcliffe*, attorney at *Durham*," it would have done. This was no more than saying he signed it at *Durham*, and was no communication of *Durham* being his place of abode. [The real fact was that he was a lodger at *Durham*.]

Lord *Mansfield*. The truth of it is this; in favour of justices of the peace the legislature has thought fit to prescribe a precise form. Whether right or not it does not matter. This notice does not tell you the place of abode. In words he must tell you his place of abode.

Willes, *Ashhurst*, and *Buller*, Justices, were of the same opinion. Nonsuit entered.

1803. OSBORN v. GOUGH.

that it was therefore no sufficient answer to say, that the residence might be found according to the description and by a reference to the post-office. They contended, that although *Rotherbithe* was held to be a sufficient description in the case of *Wood* v. *Folliott*, it by no means followed that *Birmingham*, which is a much larger and more populous place, is sufficient in the present instance; besides which, some stress appeared to have been laid in that case on the circumstance of the place described being the situation of a house of trade, which is a matter of greater notoriety than the office of an attorney; and that the case of *Taylor* v. *Fenwick* was not cited as in point, but merely to shew how strict a construction had been put by the Courts upon notices under the 24 *Geo.* 2. *c.* 44.

Lord ALVANLEY Ch. J. The 24 *Geo.* 2. was framed for the protection of magistrates against whom actions should be brought for any thing done by them under colour of their offices; but I have no difficulty in saying, that the present Defendant has had the protection which the statute was intended to afford to persons in his situation; for the notice which has been given would certainly have enabled him to avail himself of all the benefits conferred by the act. The act certainly requires not only that the name of the Plaintiff's attorney, but the place of his abode should be indorsed on the notice. Here it is objected that the words "of *Birmingham*" are not a sufficient description of the attorney's place of abode, on account of the extent of the town of *Birmingham*. The interpretation which I put upon the statute is this, that if the place indorsed upon the notice be the true place of the attorney's abode, it lies on the defendant to shew that such description has not afforded him the opportunity of taking advantage of the act of parliament. In this case no evidence has been offered to shew that *Wm. Spurrier* could not have been found, if reasonable diligence had been used. It is admitted that the case of *Taylor* v. *Fenwick* did not decide the point now in dispute; for the objection there was not that the place of abode was insufficiently described, but that nothing was stated but merely the place at which the notice was signed. The other two cases appear to me to be in favour of the Plaintiff. That of *Wood* v. *Folliott* is extremely strong. The excise laws require that the place of abode both of the Plaintiff and his attorney shall be stated in the notice; and the Plaintiffs in that case being three partners, one of them

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was described as of the place where the business was carried on, and the others as "late" of the same place; yet the Court held the description sufficient. In that case the Court were equally called upon to take notice that *Rotherhithe* was a large place, as we are called upon to take notice that *Birmingham* is a large place. This notice has been compared to a notice of bail; but it differs in this, that a notice of bail is regulated by the peculiar practice of the Court; and being only a two days' notice, must necessarily be very accurate, or the time of inquiry will be elapsed before the bail are found. As the Defendant in this case does not appear to have been put under any difficulty in consequence of the generality of the notice, I think we ought not to grant a new trial.

ROOKE J. I am of the same opinion. The statute only requires such information to be given as will enable a Defendant to tender amends; but it does not require such information as precludes the necessity of all inquiry. Suppose the street were stated, but not the number of the house; in that case some inquiry must be made. *Primâ facie* this notice appears to me to be sufficient; if the Defendant had experienced any difficulty from the size of the town, or the number of persons of the same name living in it, that fact might have been shewn. I agree with my Lord, that the notice required by the statute is not like a notice of bail; for unless the description in the latter be extremely accurate, the time for inquiry after the bail, which is very short, may be consumed before they are discovered. But in this case a whole month is given for tendering amends before the Plaintiff can commence his action.

CHAMBRE J. I entirely agree with the rest of the Court. The case of bail does not appear to me to bear any analogy to the present. The persons respecting whom notices are to be given in cases of bail, are often in obscure situations, and the time allowed for finding them out, and inquiring into their character and sufficiency, is no more than two days. But in the case of notices under the statute a month is allowed for finding out the attorney before an action can be brought, and the persons to whom the notice relates are the officers of the public courts of justice. I agree, indeed, that the description ought not to be quite vague; perhaps such a place ought to be stated as may be sufficient for a venue. But where such a description as the present is given no difficulty can arise. The attorney might easily have been found by applica-

1803.

Osborne v. Gough.

tion to the post-office. The true rule seems to me to be, that such reasonable notice ought to be given as will enable the Defendant to make a tender.

Rule discharged.

Nov. 28th.

Muller v. Hartshorne.

If the Defendant pay money into court generally, upon a declaration containing a count on a policy of insurance, together with the money counts, and it appears that the Plaintiff by his conduct previous to the trial induced the Defendant to believe that the only point to be tried was a question of fraud, and suffered him to prepare his evidence accordingly, the Court will not allow the Plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by payment of money into court.

In *C.B.* if the Plaintiff proceed to trial after money paid into court, he is notwithstanding entitled to costs up to the time of the money being paid in.

If the rule of court for the examination of witnesses by commission express that the depositions of witnesses at *Hamburgh* and *Lubeck* are to be taken, and the commission is directed to persons at *Hamburgh*, the expences of bringing witnesses from *Lubeck* to *Hamburgh* ought to be allowed upon taxation.

THIS was an action on a policy of assurance on goods. The declaration consisted of three counts; the first was on the policy, the second was on an adjustment, and the third for money had and received. The Defendant pleaded the general issue, and the cause coming on to be tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Michaelmas* term, the defence relied upon and proved was fraud in effecting the policy, the Plaintiff, who resided at *Hamburgh*, and sent from thence the letter ordering the insurance, having been aware at the time he sent that letter, that the ship on board which the cargo insured had sailed, was lost; accordingly a verdict was found for the Defendant. But before the Defendant went into his case, the Plaintiff's counsel objected to any evidence being received which tended to avoid the contract, insisting that the Defendant who had paid the premium into court generally, without confining it to the money count, had thereby admitted the validity of the contract, and the Plaintiff's right to recover upon it, and had precluded himself from offering any evidence but such as went to reduce the value of the goods insured. His Lordship, however, overruled the objection.

A rule *nisi* having been obtained, calling on the Defendant to shew cause why a new trial should not be had; the Defendant's attorney in answer to that application, made an affidavit stating the following circumstances: that the cause was tried on admissions of all other material facts except the question of fraud; that the Plaintiff, in a bill filed in the Exchequer against the underwriters, for a commission to examine witnesses at *Hamburgh*, stated the precise point in issue, *viz.* the fraud in antedating the letter of orders; that on the 7th of *February* 1803, the Defendant, under a rule for withdrawing the plea of the general issue, pleading it *de novo* and

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paying money into court, paid the premiums into court; the Defendant at the same time consenting to a commission for the examination of witnesses at *Hamburgh*; that after the money so paid in, copies of the interrogatories and cross-interrogatories on the part of the Defendant, directed solely to the question of fraud, were communicated to the Plaintiff's attorney; that on the 18th of *February* 1803, the attornies on both sides drew up a written consent that the depositions taken under the above interrogatories and cross-interrogatories should be read in evidence in this cause which had been set down for trial, instead of one of the other causes in which the consent for the commission had been obtained (all having been consolidated, that is four upon the event of this cause, and four upon the event of the cause set down); and that the Plaintiff's attorney, instead of apprizing the Defendant's attorney of any objection on the ground of the contract being admitted by the mode in which the money had been paid into court, had on the day before the trial of the cause, applied for and obtained an admission of the subscription to the policy.

Bayley Serjt. shewed cause and argued, in the first place, that the payment of the premium into court generally, was not such an admission of the contract as precluded the Defendant from shewing that the policy was void as having been fraudulently effected. But as the Court gave no opinion upon this point the argument is omitted.] 2*dly*, He insisted that the Plaintiff had waved the right of making the objection now urged, inasmuch as he had by his conduct put him to the expence and trouble of collecting that very evidence, the receipt of which he opposed at the trial, and that the Court therefore would not allow him to be heard upon it.

Shepherd Serjt. *contrà*, contended that nothing but a positive agreement could preclude the Plaintiff from insisting on a point of law; and that if the circumstance of his having prepared to support his case upon other grounds were to be deemed a sufficient reason for preventing him from insisting on a legal advantage, the same argument might be used in every case where a point of law is started at the trial, even though it should happen to be suggested by the counsel at the trial for the first time.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. We wish to be understood to give no opinion upon the point whether the payment of money into court in

1803. MULLER v. HARTSHORNE. this case did or did not admit the contract, and establish the Plaintiff's right of action; because, under the circumstances of this case, we think the Plaintiff is not at liberty to avail himself of such an objection. The Defendant paid the premiums into court on the 7th of *February*, and after that act done by him, the interrogatories and cross interrogatories were communicated, all tending to establish that fraud which was the only point in dispute, and the examinations at *Hamburgh* were permitted to proceed. Indeed, up to the time of the trial, the same conduct was pursued by the Plaintiff, and the question therefore is Whether we ought to listen to such an objection as has been taken to the evidence offered on the part of the Defendant, when the Plaintiff himself induced him to procure that evidence? As soon as the money was paid into court the objection should have been communicated, and not having been communicated, we are all most clearly of opinion, that the Plaintiff is not now at liberty to object to the receipt of the evidence in question.

Rule discharged.

Two other points afterwards arose in this case. Eight actions had been commenced respecting the same risk, four upon one policy, which were consolidated by one rule, and four upon another policy, which were consolidated by another rule; but both consolidation rules were entered into previous to the payment of money into court. One cause under each rule was set down for trial; and after the present cause had been tried, the Plaintiff withdrew the record in the other. In taxing the costs, the prothonotary allowed to the Plaintiff the costs of the three short causes, which depended on the event of this cause, up to the time of paying the money into court, and in taxing the costs of the commission, which by the rule had been made to abide the event of the trial, refused to allow the Defendant the expences of taking the examinations at *Hamburgh*, or of bringing witnesses from *Lubeck* to *Hamburgh* to be examined under the commission, only allowing the costs of the commission. In consequence of this, a rule *nisi* was obtained for the prothonotary to review his taxation, in support of which, as to the first point, the case of *Burstall* v. *Horner*, 7 *T. R.* 372, was relied upon, where the Court of *King's Bench* held, that by the fair construction of the consolidation rule, the Plaintiff was bound as well as the Defendant, and that as a nonsuit in one action was conclusive in all the others, the Plaintiff was not entitled to costs in any of them,

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even up to the time of the money being paid into court; and it was intimated that the case of *Wilton* v. *Place*, *ante*, vol. 2. p. 56., where a contrary practice had been stated by the prothonotary and adopted by the Court, was founded on a mistake.

But on this point *the Court* were of opinion with the prothonotary, thinking the practice of this Court more reasonable than that of the *King's Bench*, for that the Defendant, by paying money into court, admitted that the Plaintiff was right to that amount, and that the Plaintiff therefore ought not to be deprived of those costs which he had been led into by the Defendant.

In support of the second point, the particular words of the rule of this Court under which the commission was issued were referred to, namely, "to examine witnesses at *Hamburgh* and *Lubeck*," and consequently, as the commission was directed to persons resident at *Hamburgh*, the witnesses resident at *Lubeck* must be brought to *Hamburgh*.

And *The Court* assenting to this, directed the prothonotary to allow the expences of taking the examinations at *Hamburgh*, and of bringing the witnesses from *Lubec* to *Hamburgh*.

WHITWELL *v.* BENNETT.

Nov. 28th.

If a bill drawn by John Couch be declared upon as drawn by John Crouch, the variance is fatal.

An unstamped banker's check post-dated is void.

A bill being presented by the indorsee to the drawee for acceptance, the latter on accepting it said, that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands which would be paid, he would take all risks. Held that this conversation, together with the bill accepted by the drawer, did not amount to sufficient evidence to entitle the indorsee to recover against the drawee the amount of the bill accepted on a count for money had and received.

ASSUMPSIT. The first count of the declaration was on a bill of exchange for 30*l.* drawn by one *John Crouch* on the Defendant, payable to the order of *J. F.*, accepted by the Defendant, and indorsed to the Plaintiff. The second count stated that the Defendant, according to the usage and custom of merchants, made his certain draft or order in writing, commonly called a banker's draft or check, upon Messrs. *Pread* and Company for 30l., and delivered the same to the Plaintiff, and averred a presentment for payment and refusal. There were also counts for money paid, money laid out and advanced, money had and received, and on an account stated. At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Trinity* term, the bill declared upon in the first count, when produced, appeared to be drawn by one *John Couch*, instead of *John Crouch*, as alleged. It was proved that when the bill was presented to the Defendant, he accepted it, saying, that

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1803.

WHITWELL v. BENNETT.

though *Couch* had not remitted to him, yet that he expected he would do so in a few days, and that as he had a bill of *Couch* in his hands for 80*l.* which would be paid, he would take all risks upon himself, and accordingly gave the Plaintiff a check upon his bankers Messrs. *Praed* and Co. for 30*l.* post-dated, so as not to be receivable at the banker's until after the time at which the Defendant expected a remittance from *Couch*. The Defendant afterwards finding that *Couch* did not remit, stopped the payment of the draft. Upon this evidence it was objected for the Defendant, that the variance between the name of the drawer stated in the first count of the declaration, and that which appeared upon the bill was fatal with respect to that count; and secondly, that the draft being post-dated was void, not being within the exemption of the 31 *Geo.* 3. *c.* 25. *s.* 4. Lord *Alvanley* was of opinion that the first objection was fatal, but directed the jury to find a verdict for the Plaintiff on the other counts, reserving liberty to the Defendant to move the Court to set that verdict aside. A rule *nisi* having accordingly been obtained on a former day,

Shepherd Serjt. now shewed cause. After the case of *Allen* v. *Keeves*, 1 *East*, 435, it is impossible to contend that the draft in this case is within the exception contained in the 4th section of 31 *Geo.* 3. *c.* 25. Considering the draft however as out of the question, the verdict may be supported upon the money counts. Although there was not originally that privity between these parties which exists between the drawer and acceptor of a bill, yet the circumstance of the Defendant promising to pay the bill because he had another bill of the drawer in his hands which would be paid, is sufficient *primâ facie* evidence to entitle the jury to presume that he did receive the money upon that bill, until he shews the contrary. If this presumption be allowed, the money, which the Defendant may be supposed to have received upon that bill, is money had and received to the drawer's use, which he has promised to pay over to the Plaintiff. In *Tatlock* v. *Harris*, 3 *T. R.* 174, a bill of exchange having been drawn by the Defendant amongst others upon himself, in favour of a fictitious person, and accepted by him, and the Defendant having received the value of it, a *bonâ fide* holder recovered against the Defendant upon the money counts; and Lord *Kenyon* said, that it was an appropriation by the Defendant of so much money to be paid to the person who should become the holder of the bill. In this case, therefore,

1803.
WHITWELL v. BENNETT.

the Defendant not having shewn that the bill of the drawer which he had in his hands, and which he said would be paid, was not paid, it must be presumed that it was paid, if so, the Defendant had specifically appropriated a part of the amount to the Plaintiff's use. In *Israel* v. *Douglas*, 1 *H. Bl.* 239, the Court of *Common Pleas* held that an action for money had and received might be maintained against the Defendants, who being indebted to one *Del Vallé* for brokerage, and *Del Vallé* being indebted to the Plaintiff for money lent, *Del Vallé* gave an order to the Defendants to pay the Plaintiff the sum due from them to himself, as a security; which order was accepted by the Plaintiff, and on which the Plaintiff lent *Del Vallé* a further sum. In that case the Defendants had not actually received money belonging to the Plaintiff any more than the Defendants in this Case, yet the Court held that the fair effect of the transaction was, that the Defendant might be deemed to have received money to the Plaintiff's use; Lord *Loughborough* observing, that they were estopped by their own promise. So in *Fenner* v. *Meares*, 2 *Bl.* 1269, the action for money had and received was held to be maintainable in favour of the assignee of a *respondentia* bond, where the obligor had engaged by an indorsement to pay the same to any assignee. The same doctrine is supported by the case of *Grant* v. *Vaughan*, 3 *Burr.* 1516, where it was laid down that the holder of a note made payable to bearer might maintain an action for money had and received against the drawer. It only remains then to be considered, whether, as the Defendant acknowledged to the Plaintiff that he had a bill in his hands belonging to the drawer of the bill which would be paid, it must not be presumed that it was paid, and that he received the money, since the contrary was not shewn. To this point the case of *Longchamp* v. *Kenny*, *Doug.* 137, may be cited. There the Defendant having got possession of a masquerade ticket given to the Plaintiff to dispose of, and which the latter was to account for to the owner, upon being required by the owner to pay the produce of it, said, " Well, if I had it, what then? Go to the person who received it of you, and let him pay it," upon which, the Plaintiff, to avoid arrest, paid the value of the ticket to the owner, and brought an action for money had and received against the Defendant, and was permitted to recover in that form of action. The Court in that case said, that if the Defendant had sold the ticket and received the value of it, it was for the Plaintiff's use,

1803. WHITWELL v. BENNETT.

ufe, the ticket being his; and that as he had not produced the ticket, it was a fair prefumption that he had fold it.

Vaughan Serjt. in fupport of the rule. The verdict in this cafe cannot be fuftained upon the money counts, for it having been expresfly found that the Defendant at the time he accepted the bill drawn upon him by *Couch*, had no effects in his hands, though he expected a remittance from *Couch*, his acceptance can only be confidered as an acceptance for the honour of the drawer. None of the cafes, therefore, in which an acceptance has been held to be *primâ facie* evidence of money in the hands of the acceptor, are applicable to the prefent cafe; for the circumftances of this cafe preclude the Plaintiff from faying that the Defendant had money belonging to the drawer in his hands at the time of the acceptance. Indeed, the argument infifted upon for the Plaintiff goes the length of fhewing that in no cafe whatever is it neceffary to declare againft the acceptor upon a bill of exchange: for if the Plaintiff in this cafe ought to recover, refort may always be had to the money counts, and the bill merely be employed as evidence in fupport of thofe counts. The cafe of *Tatlock* v. *Harris* is perfectly diftinguifhable from this: there all the parties were privy to the nature of the tranfaction, and the Defendant had allowed his name to be ufed upon the bill for the purpofe of raifing money. With refpect to the cafe of *Longchamp* v. *Kenny*, it was there fhewn that the value of the ticket which the Defendant had retained was five guineas, and the prefumptive evidence that he had actually received that fum was extremely ftrong, for his expreffion on being charged with having received the money amounts almoft to a confeffion that he had received it. In this cafe the only evidence to charge the Defendant, is his acknowledged expectation that a bill of the drawer in his poffeffion would be paid when due; but *non conftat* that he was not deceived in his expectation, and poffibly the bill ftill remains unpaid.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. This was an action on a bill of exchange with a count on a banker's check, and alfo the common money counts. On the firft and fecond counts the Plaintiff is precluded from recovering, by objections in law taken on the part of the Defendant, which are infurmountable. The Plaintiff however infifts that he is entitled to recover upon the count for money had and received. Upon that point the queftion for our confideration arifes on the

 conversation

conversation which passed between the parties at the time when the Defendant accepted the bill drawn upon him by *Couch*, and of which the Plaintiff was indorsee. At that time the Defendant told the Plaintiff that he expected remittances from *Couch*, and that as he had a bill for 80*l.* belonging to *Couch* in his hands, which would be paid, he would run all risks, and accordingly gave the Plaintiff a check upon his banker. The question then is, whether this declaration of the Defendant's be not *primâ facie* evidence that the 80*l.* bill was paid? for if that bill was paid the action for money had and received would be maintainable on the ground of the Defendant's specific appropriation of that money to the payment of the Plaintiff's demand. It has been contended that the above declaration of the Defendant's puts it upon him to shew that the bill was not paid. In support of this proposition the case of *Longchamp* v. *Kenny* was relied upon, where Lord *Mansfield* held that the sale of a ticket and the receipt of the price by the Defendant might be presumed against him unless he produced the ticket. But in that case there was abundant evidence out of the Defendant's own mouth that he had received the price of the ticket till he proved the contrary. Indeed there was another circumstance in that case which distinguishes it from the present, *viz.* that the Defendant there had complete notice of the question which was to be tried between himself and the Plaintiff, and could not be surprised by the form of the count under which the plaintiff recovered. In this case it was undoubtedly a surprise upon the Defendant, for he came to trial prepared to resist the counts upon the bill and check, and to shew that he never accepted the former. It would be going too far therefore to presume that because the Defendant did not produce the 80*l.* bill (which was not in question) he must have received the amount. The case of *Longchamp* v. *Kenny* therefore is distinguishable from the present, and the Plaintiff, whatever be the merits of his case, must be nonsuited.

Rule absolute.

Nov. 28.

WRIGHT *v.* WALKER.

If bail above be put in and justified within four Days from the ruling the Sheriff to bring in the body, the Court will set aside all proceedings upon the bail bond commenced previous to the time of justification.

THE sheriff having been ruled to bring in the body on the 23d of *November*, the Plaintiff immediately afterwards took an assignment of the bail-bond, sued out writs against the Defendant and the bail returnable on the 25th, and delivered declarations against them. On the 25th bail above were put in; and notice of justification having been given, the bail were justified within the four days from the ruling of the sheriff. A rule having been obtained to shew cause why the proceedings on the bail-bond should not be set aside for irregularity,

Bayley Serjt. now shewed cause, and contended, that although the Plaintiff, after taking an assignment of the bail-bond, is not at liberty to proceed against the sheriff, yet that, according to the practice of the Court, he is at liberty, after ruling the sheriff, to take an assignment of the bail-bond and proceed thereon.

Sellon Serjt. *contra*, insisted that the Plaintiff, by ruling the sheriff to bring in the body, had given four days to put in bail, and as bail had been put in within that time the Plaintiff ought not to have proceeded on the bail-bond.

The Court were of opinion, that as bail had been put in and justified according to the rule upon the sheriff, it was not competent to the Plaintiff to proceed upon the bail-bond; though, if the rule upon the sheriff had not been complied with the Plaintiff might have taken an assignment of the bail-bond, and have proceeded upon it after having ruled the sheriff.

Rule absolute.

1803.

HESSE *v.* STEVENSON.

Nov. 28.

Covenant by the assignor of certain shares in a patent-right that he has good right, full power, and lawful authority to assign and convey the said shares, and that he has not by any means directly or indirectly forfeited any right or authority he ever had or might have had over the same. Held that the generality of the former words of the covenant is not restrained by the latter.

If the assignees of an uncertificated bankrupt in their own names execute a deed with other creditors, whereby they, and all the creditors who may sign the said deed, release the bankrupt from all actions, suits, claims, and demands against him or his estate, and such deed be not signed by all the creditors of the bankrupt, the assignees are not barred from claiming as assignees the benefit of a patent-right afterwards obtained by the bankrupt. A patent-right for the exclusive exercise of an invention obtained from the Crown by an uncertificated bankrupt, is affected by the previous assignment of the commissioners, and vests in the assignees.

An act of parliament, empowering such bankrupt-patentee, his executors, administrators, and assigns, to assign the right to a greater number of persons than allowed by the letters patent, and declared to be a public act, does not enable either the bankrupt or his assigns to make a better title than they could before the act.

THIS was an action of covenant, tried before Lord *Alvanley* Ch. J. at the sittings after Easter Term 1803. The declaration stated, that by deed poll made by the Defendant on the 5th of *January* 1802, reciting that certain letters patent had been granted by his present Majesty to one *Matthias Koops*, bearing date respectively the 17th day of *February* and the 28th day of *May* 1801, granting unto the said *M. Koops*, his executors, administrators, and assigns, the sole privilege of making paper from straw, hay, thistles, waste and refuse of hemp and flax, and different kinds of wood and bark, for the term of 14 years, and 14 years, from the respective dates of the said respective letters patent, and for the places in the said letters patent particularly and respectively mentioned; also reciting, that the said *M. Koops*, by deed of assignment of the 26th of *February* 1801, assigned over certain shares of the said letters patent unto *James Stevenson*, (the Defendant,) *John Forbes*, *John Hunter*, and *William Tate*, their executors, administrators, and assigns; and also reciting, that by an act of parliament passed in the 41st year of his present Majesty's reign it was (among other things) enacted, that it should and might be lawful to and for the said *M. Koops*, his executors, administrators, and assigns, or any or either of them, to transfer or assign the said letters patent respectively, or either of them, or any part or share, parts or shares thereof, or any benefit or advantage to arise therefrom, to any number of persons not exceeding 60; and also reciting, that the said *James Stevenson* had agreed to sell and dispose of ten 1000th parts or shares of and in the said letters patent to the Plaintiff in consideration of the sum of 1800*l.*, and that the said *James Stevenson* assigned the same accordingly; the said *James Stevenson* did by the said deed poll covenant, promise, and agree to and with the said *O. L. Hesse*, his executors, administrators, and assigns, that he the said *James Stevenson* had good right, full power, and absolute and lawful authority to assign and convey

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1803.
HESSE v. STEVENSON.

the said ten 1000th parts or shares of and in the said letters patent and concern for making paper from straw and other base materials, and then the Plaintiff assigned by way of breach that the said *James Stevenson* had not good right, full power, or absolute or lawful authority to assign and convey the said ten 1000th parts or shares of and in the said letters patent and concern, according to the tenor and effect, intent and meaning of the said deed poll. The Defendant by his plea craved oyer of the deed, and the covenant was stated in these words, "That I, the said *James Stevenson*, have good right, full power, and absolute and lawful authority to assign and convey the said ten 1000th parts or shares of and in the said letters patent and concern for making paper, &c. and that I have not, by any means, directly or indirectly, forfeited any right or authority I ever had, or might have had, over the same ten 1000th parts or shares." And then the Defendant pleaded, that he had good right, full power, and absolute and lawful authority to assign and convey the said ten 1000th parts or shares of and in the said letters patent and concern, according to the tenor, effect, intent and meaning of the said deed poll, and of the covenant of the said *James Stevenson* in that behalf made as aforesaid; upon which issue was joined. The jury found a verdict for the Plaintiff for 1800*l.*, subject to the opinion of the Court upon the following case:

On the 30th *June*, in the year 1790, a commission of bankrupt issued against the said *M. Koops*, whereupon he was duly declared a bankrupt, and *William Chapman* and *Thomas Hill* were chosen assignees under the same; and from that time to this, the said *M. Koops* hath not obtained his certificate. On the 17th day of *February* and the 18th day of *May* 1801, the said *M. Koops* obtained his Majesty's letters patent, as stated in the declaration. An act of parliament, passed in the 41st year of the reign of his present Majesty, recited in the deed and in the said declaration, enabling the said *M. Koops*, his executors, administrators, and assigns, to assign the benefit of the said invention to any number of persons not exceeding 60, &c., which act is declared to be a public act. On the 9th day of *September* 1801, the creditors of the said *M. Koops* executed a deed, which, after reciting the commission of bankrupt, and the several proceedings had under the same, and that the said *M. Koops* had, by advertisement in the *London Gazette*, called a meeting of his creditors on the 12th day

of

of *June*, at which he propofed to pay all his creditors, who had proved their debts under the faid commiffion, as much as then remained due to them, namely, five fhillings in the pound, within one month, and the remainder by three inftalments, to be fecured by the faid *M. Koops* in fuch manner as his faid affignees fhould think proper; but that fuch inftalments of the foreign debts fhould be depofited in the hands of bankers to be approved of by his faid affignees, or paid into the Court of Chancery, to abide the event of an application to that Court, to be made within twelve months; and that the faid *M. Koops* fhould indemnify the affignees againft all the cofts of fuch application, and the carrying the agreement after mentioned into effect; and that thereupon, by a memorandum in writing, figned by the creditors of the faid *M. Koops*, parties thereto, dated the faid 12th day of *June* 1801, after reciting the faid propofal, it was unanimoufly agreed by the faid feveral creditors that the faid propofal fhould be acceded to, and that the affignees fhould take fuch meafures as might be neceffary to carry the fame into effect; and that, on receipt of the firft inftalment, and fuch fecurity being given for the payment of fuch refpective debts, and depofiting the firft dividends on the foreign debts by the faid *M. Koops*, the faid feveral creditors did thereby undertake, fo far as concerned themfelves, refpectively to execute good and fufficient releafes in the law to the faid *M. Koops*, and to give him fuch affiftance in fuperfeding the commiffion of bankrupt as the faid affignees fhould think proper; and further reciting, that the faid *M. Koops* had, in purfuance of the aforefaid agreement, paid to the affignees, and fuch other of the faid feveral creditors of the faid *M. Koops*, parties thereto, as were refident in *England*, five fhillings in the pound upon the amount of their refpective debts proved; and that, on the day of the date of the faid deed, he paid into the banking-houfe of Baron *Dimfdale* and Co., to the account of the affignees, five fhillings in the pound on the foreign debts; and alfo, that in purfuance thereof the faid *M. Koops* had given to the affignees a warrant of attorney for 20,000*l.* to fecure the remaining fifteen fhillings in the pound. It was witneffed, that in confideration of the premifes, the faid *M. Koops* did undertake to pay the faid *William Chapman* and *Thomas Hill*, their executors, adminiftrators, or affigns, the remaining fifteen fhillings in the pound, in truft, to pay themfelves and the reft of the creditors, parties thereto, refident within this kingdom, the re-

1803.
HESSE
v.
STEVENSON.

maining fifteen shillings in the pound on their respective debts, by three instalments; and also to pay into the said banking-house, in the name of the assignees, the remaining fifteen shillings in the pound upon the foreign debts; and in case of any surplus after payment of such debts, and all costs and expences, to pay the same to the said *M. Koops*, his executors or administrators, or otherwise, as he or they should direct; and it was further witnessed, that in pursuance of the aforesaid agreement, and in consideration of the premises, they, the said *William Chapman* and *Thomas Hill*, and the several other creditors of the said *M. Koops*, parties thereto, did remise, release, and quit claim unto the said *M. Koops*, his heirs, executors, and administrators, all actions, suits, claims, and demands whatsoever, which they or any or either of them then had or hath, or thereafter should or might have, challenge, claim, or demand, against the said *M. Koops*, his heirs, executors, administrators, or his or their estate or effects, on account of the debts to them or any or either of them then due and owing from the said *M. Koops*, or of any other cause, matter, or thing whatsoever, save and except such actions, suits, claims, or demands as might arise under or by virtue of the said deed, or of the said bond or judgment therein-before recited; and further, that until default in payment of the instalments, the said *William Chapman* and *Thomas Hill* should not take out execution on the said judgment, or proceed on the said bond, or otherwise molest the said *M. Koops*; and that upon payment of the said instalments satisfaction should be acknowledged on the roll. Three of the creditors of the said *M. Koops*, who had proved debts under his commission to the amount of about 600*l.*, never executed such deed. The said *M. Koops* paid the first instalment, but failing to pay the subsequent instalments, he lodged certain securities in the hands of the solicitor to the assignees, amounting to 1690*l.* 11*s.* 6*d.*, the produce of which has since been received by the assignees for the benefit of the creditors. He also lodged certain securities from a Mr. *Richard Twiss* in the same hands, to the amount of 3500*l.* which has since been proved by the said *William Chapman* and *Thomas Hill*, under a commission of bankrupt against the *Richard Twiss*, and the remainder of the said fifteen shillings in the pound not having been satisfied by the said *M. Koops*, the said *William Chapman* and *Thomas Hill* entered up judgment against the said *M. Koops*

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on the warrant of attorney given by the said *M. Koops* on the 31st day of *March* 1802, and on the 14th day of *October* 1802, issued a *fi. fa.* thereon, against the said effects of the said *M. Koops*, and entered the dwelling-house of the said *M. Koops*, sold his furniture and other effects therein, amounting to a considerable sum of money, and also entered upon the premises where the manufactory under the said letters patent and act of parliament were carried on, and took possession of the same and the effects therein, under the said execution, and still continue to keep possession thereof.

The question was, Whether the Plaintiff was intitled to recover? if so, the verdict to stand, if not, to be entered for the Defendant.

Onslow Serjt. for the Defendant, was called upon by the Court to begin. First, Upon the fair construction of the covenant upon which the Plaintiff has declared he cannot recover, unless he shew by way of breach, that the Defendant has by some act of his own impeached that title which he conveyed to the Plaintiff. Secondly, Supposing the conveyance from the Defendant to have been imperfect, still the assignees, by their conduct, have precluded themselves from disputing the title which the Defendant conveyed to the Plaintiff. Thirdly, The interest of *M. Koops* in the patent did not pass under the assignment of the Commissioners of Bankrupt. Lastly, The act of parliament stated in the case, enabled the Plaintiff to convey a good title. First, the words of the covenant are, that the Defendant has good right, full power, and absolute and lawful authority to assign and convey, but they are followed by the qualification, that he has not done any thing to forfeit his right. This qualification must be construed to control the whole covenant; nor will the arrangement of the words vary that construction. The doctrine laid down in *Browning* v. *Wright*, *ante*, vol. 2. p. 13., is peculiarly applicable to the present case. In that case, Lord *Eldon*, after stating that covenants against the acts of all mankind, are in general only required in conveyances of leasehold property, observes, "What would be the use of any of the other covenants if the covenant relied on were general? It would be of little service to the grantor to insist that the warranty and the covenants for quiet enjoyment and further assurance were specially confined to himself and his heirs, if the grantee were at liberty to say, I cannot sue you on those covenants, but I have a cause of action arising on a general covenant that supersedes them all." In support

1803. HIBBE v. STEVENSON

of his reasoning upon this point, his Lordship refers to the case of *Fielder* v. *Studley*, *Finch* 90. Mr. J. *Buller* says: "The Defendant has expressly told us in one part of the deed, that he means to covenant against his own acts, and are we to say that he has in the same breath covenanted against the acts of all the world?" And Mr. J. *Heath* observes that, "When any sentence contains distinct covenants, and there are words of restriction either in the prefatory or concluding part, those words must be extended to every part of the sentence, unless the intention of the parties appear to require a contrary construction." On the authority of this case, I contend that the Defendant's covenant is confined to the impeachment of his title by some act of his own. Both in deeds and wills the Court is to look to the real intent of the parties. The principle above laid down by Mr. Justice *Heath* is very old, and was adopted by Lord *Mansfield* in the case of *Kingston* v. *Preston*, *cit. Doug.* 689. *ed.* 2. The case of *Nervin* v. *Munns*, 3 *Lev.* 46. is a very strong authority in favour of the Defendant. In that case there were four covenants, the first, third and fourth were restrained to the acts of the grantor and his ancestors, the second was unlimited; and three Judges against *North* Ch. J. held, that as the grantor had first covenanted against his own acts, it could not be intended that he had immediately afterwards, in a covenant to the same effect, covenanted against the acts of all the world. If the case of *Gainsforth* v. *Griffith*, 1 *Saund.* 60. be relied upon by the other side, the same answer which was given to it in *Browning* v. *Wright* may be given here; namely, That the covenants there respected leasehold property. Secondly, The Cases of *Evans* v. *Mann*, *Cowp.* 569.; *Chippendale* v. *Tomlinson*, *Cooke's Bank. L.* 462, ed. 1. and *La Roche* v. *Wakeman*, *Peake's N. P.* 140., shew that unless the assignees disaffirm the title of an uncertificated bankrupt, he may dispose of the property acquired by him subsequent to the bankruptcy. Besides, the assignees have by their own express acts precluded themselves from disputing the title of the bankrupt; for at a public meeting of the creditors summoned by advertisement in the Gazette, they entered into a composition with *M. Koops*, the terms of which have been complied with by him, and in consideration of which, the assignees, together with the creditors present at that meeting, remised and released to *M. Koops* all actions, suits, claims and demands whatever. Shall the assignees after reaping the benefit of the composition entered into with *M. Koops*, now or at any future time, be

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at liberty to disaffirm his title to that property which he conveyed to the Defendant, and the Defendant to the Plaintiff? The assignees have the power of compounding a debt if they think proper, and such composition will be good against the creditors, though the conduct of the assignees may be impeached before the Lord Chancellor. Supposing the deed of composition not to be legally binding upon the assignees because some of the creditors did not assent, yet inasmuch as it has been carried into effect, it may operate in a court of equity, and may induce such court to enjoin the assignees from doing any act by which the title of the bankrupt may be disaffirmed. If so, the Defendant's title is not radically bad: for the Defendant can never be evicted, and consequently can have no right to complain of a breach of covenant. Thirdly, The right to the invention being a mere metaphysical right, did not pass to the assignees under the commission. It was nothing but a right to exercise a particular invention. Now the case of *Chippendale* v. *Tomlinson* clearly shews, that the assignees have no power to let out either the person or the talents of the bankrupt. Could not *M. Koops* have applied to monied men, and offered to exercise this invention as their servant? and could the assignees in such case have claimed the fruits of his ingenuity? [*Chambre* J. The right to the patent is made assignable: why then may it not be assigned under a commission of bankrupt?] The right of assignment contemplated in the grant was a voluntary assignment, whereas the assignment under a commission is compulsory. Lastly, The assignment of *M. Koops* to the Defendant, and consequently that of the Defendant to the Plaintiff, is authorised by the act of parliament stated in the case. The object of that act was to enable *M. Koops* to convey, and therefore necessarily establishes all conveyances made by him. In the deed by which *M. Koops*, previous to the passing of the act of parliament assigned to the Defendant, it is true that no mention was made of the bankruptcy of *Koops*; but the act of parliament subsequent to that deed, having enabled the *assigns* of *Koops* to assign over to others, is a legislative acknowledgment of the Defendant's right to execute a good conveyance to such persons as he should think fit.

Bayley Serjt. for the Plaintiff. The cases cited respecting covenants do not apply to this case, in which the general covenant

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1803. HESSE v. STEVENSON

relied upon is of a different nature from the particular covenants in the ſame deed, and is independent of them. In the caſe of *Browning* v. *Wright* the covenants were preceded by theſe introductory words, "for and notwithſtanding any thing by him done to the contrary," which words were applicable as well to the covenant in diſpute as to that which preceded it. The caſe of *Fielder* v. *Studley*, was an application to a court of equity by bill for relief againſt an action of covenant at law on the ground of a miſtake; it appearing by the deed that all the covenants were made with the ſame view, and yet that one of them was general and all the reſt limited; the foundation of the decree therefore was, that the parties had made a miſtake, ſince the covenant ſued upon was contradicted by the reſt. It may alſo be obſerved of the caſe of *Nervin* v. *Muns*, that both covenants were made with the ſame intent, and therefore to have given effect to one as general, and to the other as limited, would have been a groſs contradiction. In order therefore to bring this caſe within the authority of the above deciſions, it muſt be made out that the covenant now ſued upon is inconſiſtent with the other covenants in the ſame deed. If in, fact, that deed had contained any other covenants inconſiſtent with the general covenant for title, the Defendant would have ſet them out upon oyer, and have thus brought them before the court. The latter part of the covenant ſet out, by which the Defendant declares that he has not forfeited his right, may perhaps have been unneceſſary, after the former general ſtipulation, that he had good right to convey; but though unneceſſary, it is not contradictory to the former part. It has alſo been urged upon the authority of *La Roche* v. *Wakeman*, that *Koops* had good title to convey, notwithſtanding his bankruptcy; but that caſe only proves that an uncertificated bankrupt has a good title againſt a wrong-doer. Lord *Kenyon* there ſays, "If the aſſignees of *Smith* (the bankrupt) take any ſteps to diſaffirm his title they may do ſo; but if they do not, he being the oſtenſible owner, may convey a title to the Plaintiffs, ſubject to be diſaffirmed by them." The aſſignees therefore have a better title than the bankrupt, and may interfere to defeat his conveyance. In the caſe of *Evans* v. *Mann*, it was determined, that the aſſignees of a bankrupt may maintain an action for the value of goods acquired by an uncertificated bankrupt ſubſequent to his bankruptcy, and ſold by him, without naming themſelves aſſignees; Lord *Mansfield* obſerving, that the

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property of the goods was in the assignees, and that the sale by the bankrupt was a contract by him as their agent, and on their account. So in this case, though the assignees suffered *Koops* to carry on the patent, they might have taken it to themselves. The cases of *Webb* v. *Fox*, 7 *T. R.* 391. and *Fowler* v. *Down*, *ante*, vol. 1. p. 44. proceeded upon the same principle as that of *La Roche* v. *Wakeman*, admitting the right of the assignees to interfere, but allowing the bankrupt himself to maintain an action until such interference should take place. If the instrument executed in this case by the assignees, is to be considered as an assignment to *Koops*, it was an assignment upon terms which have not been complied with; for he contracted to pay the remainder of the debts, which he had not done. With respect to the objection that the patent did not pass under the assignment, it is sufficient to observe, that all property, both real and personal, and *choses in action* belonging to a bankrupt, pass to his assignees. If the patent in question be devisable and assignable by the bankrupt, as it undoubtedly is, why may it not pass under the assignment executed by the commissioners to the assignees? Lastly, The act of parliament stated in the case gave no authority to the Defendant to assign which he had not before the passing of that act, except as to the number of persons to whom he was permitted to assign. That act was passed *diverso intuitu*; the Legislature not having in contemplation the question, whether the property belonged to the assignees or not, but only regarding the expediency of allowing the patent-right to be divided into a greater number of shares. This appears from the preamble, which recites the very difficulty which the Legislature intended to obviate.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. The question in this case arises upon a deed poll, bearing date the 5th of *January* 1802, by which the Defendant gives and grants to the Plaintiff a share in his patent-right. The deed is not stated at length upon the record, but we consider the case as if the whole deed were now before us, because the covenants contained in that deed which are not set forth, are not at variance with the covenant upon which the breach is assigned. The covenant, upon which the question immediately arises, is, that the Defendant had good right, full power, and absolute and lawful authority to convey; and that he had not by any

means, directly or indirectly, forfeited any right or authority he ever had, or might have had over the property in question. This action arises upon the first part of the covenant, and the breach assigned is, that the Defendant had not good right, full power, and absolute and lawful authority to convey. We are called upon to decide upon the true construction of this covenant. It has been contended, upon the authority chiefly of *Browning* v. *Wright*, that this does not amount to an absolute covenant for good title, but must be confined to the acts of the party himself. We have looked with great attention into that case; and after the very able manner in which the principles which govern the construction of covenants, were then laid down by Lord *Eldon* and the other Judges, it is unnecessary for me to enter at any length into the subject. Almost every case which bears upon the point is there cited; and indeed I find more of them there stated than I expected, for I did not think that the Courts had formerly been so liberal in the construction of covenants as it appears that they have been. I have examined all these cases, but I do not think it necessary to state them, for we not only agree with the principles laid down in *Browning* v. *Wright*; but we think that the case might have been decided as it was upon the very words of the covenant, which was restrained to the acts of the party himself by the introductory words, "notwithstanding any thing by him done to the contrary;" and so Lord *Eldon* thought, though he adds, that if such were not the construction of the covenant itself, yet being coupled with the other covenant which was so restrained, it must be construed in the same manner. The Defendant having covenanted that, "for and notwithstanding any thing by him done to the contrary," he was seized in fee, *and that* he had good right to convey; the latter part of the covenant, coupled as it was with the former part, by the words "and that," must necessarily be overridden by the introductory words "for and notwithstanding any thing by him done to the contrary," and this appears to have been the opinion of the whole Court: but taking the latter covenant not to be restrained in terms, they proceeded to consider the rules by which covenants of this description are to be construed. From all the cases upon this subject it appears to be determined, that however general the words of a covenant may be if standing alone, yet if from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not

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have intended to use the words in the general sense which they import, the Court will limit the operation of the general words. The question therefore always has been, whether such an irresistible inference does arise? for, if such an inference does arise from concomitant covenants they will control the general words of an independent covenant in the same deed. In Lord *Eldon*'s judgment one case is mentioned which I think deserves some notice, because his Lordship seemed to suppose that the judgment of the Court proceeded upon the mere legal construction of the deed, without regard to any circumstances *dehors* the deed. The case to which I allude is *Fielder v. Studley*; which appears to me to be an extremely strong case in favour of the present Plaintiff, if the general covenant which was restrained by the other special covenants be considered as an independent covenant. Lord *Eldon* observes, that the Court must have proceeded "on the ground of the intent of the parties appearing on the instrument, since that intent and the consequent legal effect of the instrument could only be collected from the instrument itself, and not from any thing *dehors*." It must be remembered, however, that the application there was made to the Court of Chancery upon equitable as well as legal grounds; for, on looking into the case, I find that the Defendant's father, in 1657, had sold lands belonging to the Dean and Chapter of *Sarum*, which had been dissolved during the commonwealth. It was not very likely therefore that a party selling under these circumstances would covenant for any thing more than his own acts. It appearing that the general covenant was manifestly contrary to the true intent of the parties, application was made to the Court of Chancery to correct the mistake, in the same manner as applications are made to that Court to correct mistakes in marriage articles where clauses are inserted contrary to the intent of the parties. The decision therefore did not merely proceed upon the construction of a legal instrument, but the circumstances entitled the party to have the covenant rectified as having gone beyond the intention of the parties. But supposing that case to have been decided as a question at law, the question here is, whether the principle I have here stated, applied to this case, requires the Court to restrain the general words of the covenant sued upon? If the inference be irresistible that the parties could not intend to make a general covenant, we are bound to give the Defendant the

1803. HESSE v. STEVENSON.

benefit of that inference. The property assigned is a share in a patent-right; and it could not be unknown to the Defendant that *Koops*, the original proprietor, had been a bankrupt, though possibly the Plaintiff might be ignorant of that circumstance. I have looked anxiously through all the concomitant covenants, in order to ascertain whether they afforded any inference of an intention to restrain the covenant in question, but I find none. The deed, after reciting the manner in which the property came to *Koops* ten years before, and the assignment to *Stevenson*, contains a conveyance of his interest to the plaintiff; and then follows the warranty in question, which, instead of being framed in the usual and almost daily words, where parties intend to be bound by their own acts only, *viz.* " for and notwithstanding any act by him done to the contrary," omits them altogether; besides which, the Defendant covenants, that the assignee shall enjoy the property assigned in as ample a manner as the assignor. The omission of these words is almost of itself decisive. The attention of the purchaser is not called by any words to the intent of the vendor to confine his covenant to his own acts. The covenant that the Defendant has paid all the calls is certainly personal; but the covenant for title is general: and the Court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood. The argument on the part of the Defendant arises from the latter part of the covenant in question. If the party meant to covenant for an absolute right to convey, why, it is asked, does he covenant that he has not forfeited such right? To this it may be answered, that the latter stipulation, though unnecessary, is not inconsistent with the former. The rule of construction adopted in *Browning* v. *Wright* has never been carried to such a length as to decide, that because some clauses are introduced into a deed which do not add to the security provided by the other clauses, the security so provided is to be restrained. We are therefore of opinion, that the covenant for absolute right to convey is not restrained by the other parts of the deed. It is contended, however, that the Defendant has conveyed a good title to the Plaintiff. And first, it is said, that admitting the interest in the patent-right to have passed under the assignment of the commissioners, yet the assignees have reconveyed to the bankrupt the whole of their interest therein by the deed of the 9th of *September* 1801. It must be remembered,

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however, that nothing short of an actual conveyance by the assignees can sustain that argument, and that a mere release will not be sufficient; and it was therefore insisted that the deed amounted to a conveyance. But I have no hesitation in saying, that the deed alluded to was neither intended to convey, nor did it operate in law as a conveyance. By that deed the two persons who were the assignees of *Koops*, together with his several other creditors, parties thereto, in consideration of his having agreed to pay them fifteen shillings in the pound, and to secure the debts of the foreign creditors after the same rate, did remise, release, and quit-claim to him, all actions, suits, claims, and demands whatsoever. But it is to be observed that the persons who were assignees did not convey as such. Indeed, if they acted as assignees, why was it necessary that the other creditors should join? and they do not pretend to bind the other creditors, who were not parties to the deed. This is the deed which is said to convey to *Koops* as a purchaser all the interest of the assignees, and to make him a new man. But the words are not sufficient for that purpose. It could not have been the intention of the parties. The assignees do not affect to convey for any persons not parties to the deed. And the instalments have not been paid according to the agreement. We are therefore clearly of opinion, that it is impossible to construe this deed to be such a conveyance as has been contended for on the part of the Defendant. With respect to the supposed power of the assignees to make such a compromise with the bankrupt as that stated in the case, and the attempt to shew that it amounts to a sale of the property to him; it was not competent to assignees to make such compromise unless the other creditors had consented; nor could the transaction be deemed a sale under the usual powers. Next it is contended, that the nature of the property in this patent was such that it did not pass under the assignment; and several cases were cited in support of this proposition. It is said, that although by the assignment every right and interest, and every right of action, as well as right of possession and possibility of interest, is taken out of the bankrupt and vested in the assignees, yet that the fruits of a man's own invention do not pass. It is true, that the schemes which a man may have in his own head before he obtains his certificate, or the fruits which he may make of such schemes do not pass, nor could the assignees require him to

1803.

HESSE v. STEVENSON

to assign them over, provided he does not carry his schemes into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry. Can there be any doubt, that if a bankrupt acquire a large sum of money, and lay it out in land, that the assignees may claim it? They cannot indeed take the profits of his daily labour. He must live. But if he accumulate any large sum, it cannot be denied that the assignees are at liberty to demand it; though, until they do so, it does not lie in the mouth of strangers to defeat an action at his suit in respect of such property by setting up his bankruptcy. We are therefore clearly of opinion, that the interest in the letters patent was an interest of such a nature as to be the subject of assignment by the commissioners. Lastly, it is contended, that the act of parliament stated in the case, vested a legal interest in *Koops*, for that he must be taken against all the world to have that interest which the act of parliament recites to be vested in him, that act being a public act. But though the act be public it is of a private nature; the only object of the proviso for making it a public act is, that it may be judicially taken notice of instead of being specially pleaded, and to save the expence of proving an attested copy. But it never has been held, that an act of a private nature derives any additional weight or authority from such a proviso; it only affects *Koops* and those claiming under him, and authorises him to do certain acts, which by the letters patent he could not have done: It recites the letters patent containing a clause which prevents him from assigning to more than five persons, and then enables him to assign to any number of persons not exceeding sixty. It is not possible then to consider this act as giving any title to *Koops* which he had not at the time when it passed. Such has been the construction which has always been put upon acts of parliament of this nature. We are therefore of opinion, that no aid is to be derived to the Defendant from that act of parliament.

Per Curiam. Judgment for the Plaintiff.

COLLINS *v.* JACOBS.

Nov. 28th.

An application to change the venue from *A* to *B*, in an action for goods sold and delivered, upon an *affidavit* that the cause of action arose at *B*, and not elsewhere, may be successfully answered by an *affidavit* that the goods were sold at *C*.

THE Defendant having obtained a rule *nisi* for changing the venue from *London* to *Kent*, in an action for goods sold and delivered, upon the usual *affidavit*, that the cause of action arose in the latter county, and not elsewhere; *Lens* Serjt. on the part of the Plaintiff, produced an *affidavit*, stating, that the goods were sold and delivered at *Rotherhithe*, in the county of *Surry*; and this he contended being an answer to the *affidavit* on which the venue had been changed, inasmuch as it falsified the material allegation of the cause of action having arisen in the county of *Kent* and not elsewhere, superseded the necessity of an undertaking to give material evidence in *London*. He cited the case of *Calliand* v. *Champion*, 7 *T. R.* 205., where the Defendant, in an action upon a life insurance, having changed the venue from *Middlesex* to *London*, the Plaintiff was allowed to bring it back, on producing an *affidavit* that the person whose life was insured died in *Scotland*. He observed, that the practice of this Court had been understood to differ from the case of *Calliand* v. *Champion*, but insisted, that as a Plaintiff in a transitory action has a right to try his cause in any county in which he thinks proper, unless the Defendant will remove the venue into the county where the cause of action really arose, the plaintiff ought not to be deprived of that benefit by an *affidavit* which appears to be false; and he added, that it was impossible for the Plaintiff, in this case, to retain the venue on the usual undertaking, because he admitted that *Surry* was the county, where the material evidence was to be found, the goods having been sold and delivered there.

Bayley Serjt. *contrà*, insisted, that by the practice of this Court an undertaking was necessary, and relied on the case of *French* v. *Coppinger*, 1 *H. Bl.* 216., where the Defendant having obtained a rule for changing the venue from *London* to *Cornwall* on the usual *affidavit*, the Plaintiff shewed cause, and produced an *affidavit*, stating that the action was for money lent in *London*, but the Court refused to bring back the venue, without an undertaking to give material evidence in *London*.

Onslow Serjt. *amicus curiæ*, mentioned the case of *Roland* v. *Knapp*, *Hill.* 41 *Geo.* 3. in this Court, where the Defendant, in

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an action for words, having obtained a rule *niſi* for changing the venue from *London* to *Berkſhire* on the uſual *affidavit*, the Plaintiff produced an *affidavit*, ſtating that the action was commenced for words ſpoken in *Oxfordſhire* as well as *Berkſhire*, and the Court, after ſome conſideration, held, that notwithſtanding the practice of the King's Bench, the practice of this Court required that the Plaintiff ſhould undertake to give material evidence in the county where he had laid the venue.

Cur. adv. vult.

Lord Alvanley Ch. J. now ſaid. The Defendant in this caſe having moved to change the venue, on the uſual *affidavit* that the whole cauſe of action aroſe in *Kent*, and not elſewhere, the Plaintiff does not oppoſe this application in the uſual way, by undertaking to give material evidence in the county where the action was brought, but meets the *affidavit* of the Defendant by an *affidavit* that the whole cauſe of action, ſo far from ariſing in *Kent*, aroſe for goods ſold and delivered in *Surry*. The queſtion is whether this *affidavit* be a ſufficient anſwer to the Defendant's application? It has been decided by the Court of King's Bench, that if a Defendant apply to change the venue on the uſual *affidavit*, it is a ſufficient anſwer to ſuch application, for the Plaintiff to ſhew that the cauſe of action aroſe in more counties than one, though he will not undertake to give material evidence in the county where the action is laid. The caſe of *Calliand* v. *Champion* is directly to this effect. It was ſaid, however, that whatever the practice of the King's Bench might be, yet that the practice of this Court is otherwiſe: and two caſes have been mentioned, namely, *French* v. *Coppinger*, and *Roland* v. *Knapp*. The former of theſe caſes, however, proves nothing more than this; that when the Plaintiff reſiſts the Defendant's application to change the venue, by inſiſting that the cauſe of action aroſe in the county where he has laid it, the Court will not permit him to do ſo merely by *affidavit*, but will require from him an undertaking to give material evidence in that county. The other caſe, though it certainly has more application to the point in diſpute, only eſtabliſhes that applications to change the venue are entirely ſubject to the diſcretion of the Court, who will make ſuch rules as may be found beſt adapted to the attainment of juſtice. On looking into the papers in that caſe, I perceive that the application was made in an iſſuable

term, and that although the Court did not allow the venue to remain where it was originally laid, yet that they did not permit the Defendant to carry it into *Berkshire* according to the terms of his application; but by a sort of compromise, directed that it should be carried into *Oxfordshire*, it appearing that the words were spoken at two places very near to each other, *viz. Abingdon* and *Oxford*. In that case, therefore, the Plaintiff was enabled to obtain his judgment as soon as if the cause had been tried in *London*. If any inconvenience would be occasioned in this case by the trial of the cause in *London*, we might perhaps be induced to pursue the same course which was adopted in *Roland* v. *Knapp*; but here the whole cause of action having arisen at *Rotherhithe*, the convenience of both parties requires that the cause should be tried in *London*. Let us consider the ground of these applications to the Court. The statute of the 4 *H*. 4. *c*. 18. directs, that all attornies shall swear to make no suit in a foreign county; and great jealousy prevailed at common law respecting the trial of causes except by a jury *de vicineto*. But all that is now at an end with respect to transitory actions, and the Courts hold themselves at liberty to permit a plaintiff to bring his action wherever he thinks proper, under certain restraints. If it appear that the whole cause of action arose in one county, the Defendant is allowed of course to remove the venue into that county; and if the cause of action arose in more counties than one, though the Defendant has no right to remove the venue of course into either of those counties, yet if justice can be better obtained by a trial in one of those counties than in the county where the Plaintiff has brought his action, the Court may permit the venue to be removed into either of those counties. If the practice of this Court had been otherwise, I should certainly have followed it in the decision of this case, but I should have inclined for the future, to render the practice of both the courts uniform. At present, however, no discordancy appears: and as it has been sworn that the whole cause of action did not arise in the county of *Kent*, we think that sufficient cause has been shewn why the venue should remain where it has been laid.

Per Curiam, Rule discharged.

1803.

Nov. 28th.

DUTTON v. SOLOMONSON.

Delivery of goods by the vendor on behalf of the vendee to a carrier not named by the vendee, is a delivery to the vendee. If goods be bought to be paid for by a bill at two months, and the vendor accordingly draw upon the vendee for the value, who refuses to accept, *semb* that the vendee cannot be sued in an action for goods sold and delivered, but upon the special contract only. But certainly he cannot be sued in that form of action till after the expiration of the two months.

THIS was an action for goods sold and delivered. At the trial before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after last *Trinity* term, it appeared that on the 10th of *August* 1802, the goods in question were purchased by the Defendant of the Plaintiff at *Manchester*, to be paid for by a bill at two months; that a bill was accordingly drawn upon the Defendant for the amount of the goods, and tendered for acceptance on the 27th of *August*, which was refused, the Defendant declining to accept any bill except a bill at three months, and that not until after the goods should have arrived. The goods were delivered by the Plaintiff at the common waggon office a few days after the receipt of the order, but did not arrive in *London* until the 9th of *October*. The writ was sued out on the 6th of *September*. The jury found a verdict for the Plaintiff, but liberty was reserved to the Defendant to move that this verdict might be set aside, and a nonsuit entered.

Accordingly a rule *nisi* for that purpose having been obtained on a former day,

Shepherd Serjt. now shewed cause. Two objections are made to the Plaintiff's recovery; first, that the Defendant never received the goods; and, secondly, that under the special agreement entered into between the parties, the Defendant was not liable to be sued as for goods sold and delivered, at least until after the expiration of the two months. With respect to the first objection, a delivery to a carrier is in law a delivery to the vendee, and after such delivery the goods remain at the risk of the latter, the carrier being considered as his servant; though an exception to this general rule arises when by special contract the vendor is to pay for the carriage of the goods. [Here *the Court* intimated an opinion that a delivery to the carrier was a delivery to the Defendant, and that if it were not for the special agreement, the Plaintiff would be entitled to recover.] Secondly, the agreement between the Plaintiff and the Defendant was, that the latter should accept a bill at two months in payment of the goods: it was therefore a sale of the goods, with a condition annexed that a bill should be accepted. If a man receive a bill at two months from a vendee in payment of goods sold, and the drawer refuse to accept it, the vendor may im-

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mediately bring an action against the drawer upon the bill. This was determined in *Milford* v. *Mayor*, *Doug.* 55.; and the same point had been before ruled in *Bright* v. *Purrier*, *Bull. N. P.* 269. *Ed.* 2. The principle upon which those cases proceeded was, that there was a condition annexed to the bill that it should be accepted, on the failure of which condition the holder was entitled to sue the drawer upon the bill. So in this case, the Defendant not having performed the condition annexed to the contract of sale, the Plaintiff is entitled to sue him for goods sold and delivered. In *Stedman* v. *Gooch*, *Esp. N. P. Cas.* vol. 1. p. 5. Lord *Kenyon* ruled, that though a creditor who takes a bill payable at a future day cannot commence an action for the original debt until that period has expired, yet that if the bill be of no value, as if it be drawn on a person who has no effects of the drawer, the creditor may treat it as waste paper, and resort to his original demand. If then a creditor may under such circumstances consider a note as waste paper, and resort to his original demand, why may not a vendor who has agreed to take in payment an acceptance at two months, and who is refused such acceptance, resort to his demand for the price of the goods sold and delivered?

Bayley and *Lens* Serjts. in support of the rule. Although the Plaintiff in this case might have maintained an action on the special contract before the expiration of the two months, he was not entitled to sue as for goods sold and delivered. The contract entered into by the Defendant was to purchase goods of the Defendant, to be paid for by a bill at two months. There was no contract to pay for the goods in any other way. It was not a ready-money contract, with time given for the payment, but a contract for a special payment; and there was no other ground of action than the Defendant's refusal to accept the bill. It is true, that the holder of a bill may maintain an action against the drawer, if acceptance be refused before the expiration of the time mentioned in the bill; but in such case the action is a special action, for the bill itself is a special contract, whereby the drawer undertakes that the bill shall be accepted and paid when due. On refusal of the drawer to accept there is a breach of the contract, and consequently an immediate right of action accrues. The case of *Stedman* v. *Gooch* is perfectly distinguishable from the present. It was no part of the original contract between the parties in that case that the debt should be paid by the bills of exchange in question,

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1803. DUTTON v. SOLOMONSON.

but they were given in discharge of a pre-existing debt; and when they proved to be of no value, Lord *Kenyon* thought that the original debt revived. It has been clearly decided by the cases of *Weston* v. *Downes*, *Doug.* 23. *Power* v. *Wells*, *Cowp.* 818, and Dr. *Crompton*'s case, cited 1 *T. R.* 136, that, so long as a special contract remains open, a party cannot resort to his remedy upon the general counts. In the case of *Hulle* v. *Heightman*, 2 *East*, 145, where a seaman had contracted for wages, with a stipulation that he should not be paid till the end of the voyage, and before the end of the voyage was wrongfully discharged by the captain, the Court held, that he could not maintain a general *indebitatus assumpsit* for wages *pro ratâ*. The late case of *Mussen* v. *Price*, 4 *East*, 147, is precisely in point. With respect to the delivery, it may be observed, that in the case of *Vayle* v. *Bayle*, *Cowp.* 294, it seems to have been taken for granted, that if the vendee had not pointed out the particular mode of conveyance he would not have been liable to the risk while the goods were in the hands of the carrier, and that in *Dawes* v. *Peck*, 8 *T. R.* 330, where it was determined that the action against the carrier must be brought in the name of the consignee, the circumstance of the consignee having appointed the carrier was mainly relied on.

Cur. adv. vult.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. who (after stating the case) proceeded thus: The first objection in this case is, that the delivery of the goods to the carrier was no delivery to the person who ordered them, and therefore in that point of view this action was commenced too soon, the writ having been sued out before the arrival of the goods in *London*. When this point was first mentioned I was surprised, for it appeared to me to be a proposition as well settled as any in the law, that if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and if any accident happen to the goods it is at his risk. The only exception to the purchaser's right over the goods is, that the vendor, in case of the former becoming insolvent, may stop them *in transitu*. On this part of the case, therefore, the Court never has entertained any doubt. The principal difficulty arises

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from the special assignment entered into by the parties, and from the argument, that the Plaintiff is premature in his action for goods sold and delivered before the expiration of the two months. I was inclined at first to hope that we might hold the Plaintiff at liberty to recover on this count, as if there had been no special agreement. If goods be sold and delivered without any special agreement, the law implies a general undertaking to pay for the goods, on which an *indebitatus assumpsit* will lie. It appeared to me, that if the special agreement in this case could be considered as a collateral agreement, the Plaintiff might still be entitled to recover on the general counts; for, if the transaction between the parties could be considered as a contract for the sale of goods, with this condition, that if the purchaser would give a bill at two months he should have two months' credit; then, as the condition had not been complied with, the Plaintiff might be remitted to his original right of action for goods sold and delivered. All the cases cited are of this sort. In *Stedman* v. *Gooch* there was an antecedent debt due from the Defendant to the Plaintiff before the latter received the promissory notes, which proved of no value. Before the transaction respecting the notes took place there was a complete subsisting contract, under which the Defendant was bound to pay immediately; after this he obtained further time on giving the promissory notes, and as the condition on which the time was given was not performed, in consequence of the notes turning out to be of no value, Lord *Kenyon* thought that the Plaintiff was entitled to maintain his action for goods sold and delivered. The cases of *Puckford* v. *Maxwell*, 6 *T. R.* 52, and *Owenson* v. *Morse*, 7 *T. R.* 64, are of the same species. It appeared to me that the conduct of the Defendant might perhaps be considered in the nature of a fraud. If a man prevail upon another to deliver goods to him upon an undertaking to do something else as a satisfaction for the price of the goods, and afterwards refuse to perform his part of the agreement, there seems to be no injustice in holding, that he has repudiated the contract by refusing to comply with its conditions, and that the law may infer an undertaking to pay for the goods which he has received; and certainly considerable inconvenience may arise from the contrary doctrine; for, if a vendor be bound to bring an action on the special undertaking, his remedy will not be so effectual as if he bring his action for goods sold and delivered, because in such case the Defendant cannot be

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1803.

DUTTON v. SOLOMONSON.

holden to bail without a Judge's order. These were the impressions on my mind when the point was first started, and I should have been glad if the law would have warranted me in giving them effect. Indeed, the same arguments seem to have weighed with Lord *Ellenborough*, in the case of *Musson* v. *Price*, who accordingly there delivered his opinion in favour of the Plaintiff. But the decision in that case governs the present, the majority of the Judges having there determined, that the action could not be commenced before the expiration of the period which the bills had to run. Whatever doubts therefore I may have entertained respecting the rule which ought to be adopted, I cannot set up my judgment against a decision of the Court of *King's Bench*, which is precisely in point. It was said, indeed, in that case, that at the expiration of the period which the bills had to run an action of *indebitatus assumpsit* would lie. But I should recommend to any person bringing his action under such circumstances, to declare on the special agreement as well as on the general count, for I entertain great doubts whether, even at the end of the two months, an *indebitatus assumpsit* will lie, if it does not lie before the expiration of that period. If this matter had been *res integra*, I should have agreed in the opinion delivered by Lord *Ellenborough*, that the action was properly conceived, but the law being once settled, no material inconvenience can result from adhering to the rule which has been laid down. My Brother *Rooke*, who ruled otherwise at *Lancaster*, is perfectly satisfied with the decision of the Court of *King's Bench*; and my Brother *Chambre*, previous to the case of *Musson* v. *Price*, had ruled the same point at *York* in the same way as the Court of *King's Bench* have decided. My two Brothers therefore both now concur in that opinion, and we all think that a nonsuit must be entered.

Rule absolute.

ROGERS *v.* Sir GERVAS CLIFTON, Bart.

Nov. 26th.

Although a master be not in general bound to prove the truth of a character given by him to a person applying for the character of his servant, yet if he officiously state any trivial misconduct of the servant to a former master in order to prevent him giving a second character, and then himself upon application for a character give the servant a bad character, the truth of which he is not able to prove, the jury may from these circumstances infer malice against the master in an action against him by the servant.

THIS was an action on the case. The first count of the declaration stated, that the Plaintiff, before the committing the grievances, &c. had been retained and employed in the service of the Defendant as his butler and servant, and in that capacity had behaved with due integrity, good temper, activity, and civility, and never was suspected to have been bad tempered, lazy, or impertinent, by means whereof the Plaintiff had not only gained the good opinion of his neighbours, but had supported himself, and would thereafter have supported himself by his industry in the service of his master, had not such grievances been committed as thereinafter mentioned; and that the Plaintiff at the time of such grievances had quitted the Defendant's service, and had been recommended to, and was likely to be retained and employed by and in, the service of one *William Hand*, clerk, for certain wages to be paid to him; yet that the Defendant well knowing, &c. but contriving, &c. to injure the Plaintiff in his character, and to bring him into public scandal among his neighbours, and particularly with the said *William Hand*, and to cause it to be suspected and believed that the Plaintiff was not fit to be employed as a servant, and that he was bad tempered, and a lazy and impertinent fellow, and thereby to prevent the said *William Hand* from retaining and employing him in his service, as he otherwise might and would have done, and to vex, harass, &c. falsely and maliciously did compose and publish a certain false and scandalous libel of and concerning the said Plaintiff as such servant as aforesaid, containing amongst other things certain false and malicious matter concerning him as such servant as aforesaid, in substance as follow, that is to say, "He" (meaning the Plaintiff) "is a bad-tempered, lazy, impertinent fellow;" thereby meaning that the Plaintiff was not fit to be employed in the capacity of a servant. The second count was also for publishing a libel containing the following words, "that he, the Defendant, wished he had never taken the Plaintiff into his house, as he was a bad-tempered, lazy, and impertinent fellow." The third count stated, that before the committing the grievances, &c. the Plaintiff had been retained and employed by and in the service of one Mr. *Holland* as his ser-

1803. ROGERS v. CLIFTON.

vant, and had quitted such service; and the Plaintiff, from the time of the committing such grievances, being out of place and unemployed, the said *Holland* would, had not the grievances thereinafter mentioned been committed, have given to any person applying to the said *Holland* for a character of the Plaintiff, such a true and correct character as might have induced such persons to have retained and employed the Plaintiff as a servant; yet the Defendant knowing, &c. but contriving to injure the Plaintiff, and to induce the said *Holland* not to give him such a character as aforesaid, and thereby to impoverish and wholly ruin the Plaintiff, on the day aforesaid sent to desire the said *Holland* not to give the Plaintiff a character, for that he was a lazy, impertinent fellow; by means of which premises the said *Holland* was induced not to give, and to refuse to give the Plaintiff a character; in consequence whereof the Plaintiff was unable for a great length of time, to wit, &c. to induce or prevail upon any person to retain or employ him as a servant, and was thereby greatly impoverished and injured, &c. to his damage of 500*l.*

The Defendant pleaded not guilty.

This cause came on to be tried before Lord *Alvanley*, Ch. J. at the *Guildhall* Sittings after last *Trinity* term, when the following facts appeared in evidence. The Plaintiff having been hired as a servant by the Defendant, lived about six months in his service, when the latter turned him away without giving him a month's warning, in consequence whereof the Plaintiff, conceiving himself entitled to a month's wages, refused to quit the service without being paid that sum. On this refusal the Defendant procured an officer from the police office to put the Plaintiff out of the house, and employed his attorney to settle his wages with him. Immediately after this the Defendant, who was going into the country, called on Mr. *Holland*, with whom the Plaintiff had previously lived, to inform him that the Plaintiff had behaved in an impertinent and scandalous manner; that he the Defendant had discharged him from his service, when the Plaintiff refused to go without a month's wages; and he therefore desired Mr. *Holland* not to give him another character. While the Defendant was in the country the Plaintiff offered himself to a Mr. *Hand*, stating that he had lately lived with the Defendant, upon which Mr. *Hand* wrote to the Defendant for a character, and received the following answer:

 "Sir,

" Sir,

" In anſwer to yours which came to hand yeſterday, beg leave to acquaint you that *Thomas Rogers* did not live with me ſix months, as he has told you, and wiſh I had never taken him into my houſe, as he is a bad tempered, lazy, impertinent fellow, and has given me a great deal of trouble, as I was obliged to ſend an officer from the *Marlbro'-ſtreet* police office to put him and his things out of my houſe, and alſo to employ Mr. *Barnet* my attorney of *Soho Square* to ſettle his wages, as I look upon it he will take any advantage he can.

1803.

ROGERS v. CLIFTON.

" I am, Sir, your moſt obedient humble ſervant,

" *Gervas Clifton.*"

Upon receipt of this letter Mr. *Hand* refuſed to take the Plaintiff into his ſervice. It appeared that Mr. *Holland* never was applied to for a character of the Plaintiff after the communication made to him by the Defendant, and Mr. *Holland* ſtated, that without ſuch communication he ſhould have declined giving another character to the Plaintiff. The Plaintiff alſo proved by ſervants of the family, that while in the Defendant's ſervice he had conducted himſelf well and that no complaints of the nature aſcribed to him in the Defendant's letter had all that time exiſted. The jury found a verdict for the Plaintiff with 20*l.* damages, but liberty was reſerved to the Defendant to move to have a nonſuit entered.

Accordingly a rule *niſi* having been obtained on a former day,

Shepherd and *Williams* Serjts. now ſhewed cauſe. It may be admitted as a general propoſition, that where words are ſpoken or written by a maſter of a ſervant, or communicated in confidence, no action can be maintained for ſuch words, though, under other circumſtances, the words would be actionable; for in ſuch caſes the ſituation of the party ſpeaking or writing rebuts the inference of malice. To this extent only proceed the caſes of *Edmonſon* v. *Stevenſon*, *Bull. N. P.* p. 8, and *Weatherſton* v. *Hawkins*, 1 *T. R.* 110. But if it appear, from the circumſtances of the caſe, that the words were maliciouſly ſpoken or written, then an action lies againſt the maſter; for then he does not fall within the principle of the exception, which exempts a maſter from the ſame liabilities as other perſons, on account of the occaſion which induces them to ſpeak or write reſpecting the character of ſervants, and the motives which are ſuffered to influence their conduct. Had nothing appeared in

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this case but the answer of the Defendant to Mr. *Hand*, it might have been inferred, that the Defendant wrote the letter *quà* master; but the motives which dictated that letter may plainly be collected from the other circumstances of the case. It was not only proved that the character given by the Defendant was false, but that the Defendant, having had an altercation with the Plaintiff respecting his wages at parting, voluntarily, and without any obligation imposed upon him as master, went to Mr. *Holland* and gave the same character of the Plaintiff as he afterwards gave to Mr. *Hand*. This character, thus voluntarily and officiously given to Mr. *Holland*, must be considered as malicious; from whence it may be inferred that the character afterwards given to Mr. *Hand* was dictated by the same motives. There was therefore sufficient evidence from which the jury might infer malice in the Plaintiff's conduct.

Lens Serjt. in support of the rule. The inference attempted to be drawn from the circumstance of the Defendant going to Mr. *Holland*, and informing him of the conduct of the Plaintiff, might have been fairly drawn if any interval of time had elapsed between the misconduct of the Plaintiff and the communication of it to Mr. *Holland*. But that communication immediately followed the Plaintiff's misconduct: no inference of malice therefore ought to be raised from the Defendant having done what he probably felt it his duty to do, and which he did not defer till the moment when the Plaintiff was likely to get a character from Mr. *Holland*. If a master be justified in preventing a servant from getting a new place by stating his real character, and is not bound to prove the truth of his assertions, it should seem that upon principle the same justification ought to extend to his desiring the former master of such servant not to give him a second character. The same principle of duty influences the master upon both occasions; and, in fact, he only pursues the same end by different means. The only question in both cases ought to be, Whether what has been stated by the master has been fairly stated? and in both cases the servant ought to be called upon to shew that the statement made against him was unfair, since the presumption is, that communications of this sort are made by masters as a warning to those to whom they are made, and for the benefit of the public. If, therefore, the Court should be of opinion that the evidence in

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this case was properly submitted to the jury, still it may be contended that the facts do not warrant the jury in having drawn that inference of malice, which can alone support the verdict.

Lord ALVANLEY, Ch. J. I feel great anxiety in this case, that the public should not be led into any false notions respecting the grounds of our decision, by any incorrect statement of what passes in this place. Indeed, the hand-bill (a) which was brought to our notice when the rule now under consideration was moved for, and the authors of which, had it been regularly before the Court, we should have animadverted upon very severely, increases that anxiety which the general importance of the question itself to the public is sufficient to excite. If it were to be understood, that whenever a master gives a bad character to a servant who has quitted his service, he may be forced by the servant, in justification of such his conduct as a master, to prove the particulars which he has stated respecting the servant, it would be impossible for any master so understanding the law (at least with any regard to his own safety), to give any character but the most favourable to a servant, and consequently impossible for a servant, not entitled to the most favourable character, to obtain any new place. In the two cases of *Edmonson* v. *Stevenson* and *Weatherston* v. *Hawkins*, the law upon this subject appears to me to be laid down as clearly as can be wished. Unquestionably, the master who has given a bad character of a servant to persons enquiring after his character, is not bound to substantiate by proof what he has said; but it is equally clear that the servant may, if he can, prove the character to be false; and the question between the master and servant will always, in such case, be, whether what the former has spoken respecting the latter be malicious and defamatory? In this case we are to consider whether the evidence adduced by the Plaintiff was sufficient to be left to the jury, and whether it warranted the result which they have drawn? [Here his Lordship stated the evidence.] It appears then that the Defendant dismissed the Plaintiff from his service refusing to allow him a month's wages, to which the latter conceived he was entitled. In consequence of such re-

(a) When the motion was made for a new trial, a hand-bill was stated to the Court, address'd to servants in general, and published by the Defendant since the trial, in which all the previous proceedings in the cause were set forth, the importance of the case to all servants stated, and a subscription for carrying on the cause requested.

1803.
ROGERS v. CLIFTON.

fusal the Plaintiff would not, until compelled by force, quit the Defendant's house; a conduct not justifiable, since, however unpleasant the remedy might be, the Plaintiff's proper mode of recovering what he conceived to be due to him was by an action. This, however, was the only act of impertinence proved against the Plaintiff; and if in fact it was the only act of impertinence committed by him during his stay in the Plaintiff's service, I do not think the Defendant was, by that act alone, called upon to seek out Mr. *Holland*, and officiously state to him what he did. I do not mean to intimate, that if a servant were strongly suspected of having committed a felony while in his master's service, that master is not at liberty to warn others from taking him into their service, for it is the duty of every person to guard the public against admitting such servants into their houses. But in this case the offence imputed to the Plaintiff appears to have been of a trivial nature. It is material also to observe, that when the Plaintiff in this case applied to Mr. *Hand* for his place, and referred him to the Defendant, he did not tell him that the Defendant would give him a good character; had he done so, I should have suspected that he wished to lay a trap for the Defendant, and procure evidence to support this action; in such case I should hold a party not at liberty to ascribe the character given by his master to malice, when he had only drawn from him that which he had a right to expect. It has been argued indeed in this case, that the letter written by the Defendant to Mr. *Hand*, in its terms implied that the Plaintiff had been carried to the Police-office upon a criminal charge, but I do not think any such inference could fairly be drawn from the letter. *Weatherston* v. *Hawkins* was the case of a letter written by a friend of the Plaintiff's; yet the Court looked to see if it was dictated by malice, and being of opinion that it was not, held the action not maintainable. In this case, I think I should have grievously invaded the province of a jury, if I had not left it to them to say whether, considering all the circumstances of the case, the conduct of the Defendant was not malicious. Possibly had I been on the jury, I should not have concurred in finding the verdict which they have done; but still I do not think that we are now at liberty to disturb their verdict, thinking, as I do, that the evidence was properly left to them. At the same time, I wish it to be understood as my opinion,

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that maſters ought to be protected as much as poſſible if they honeſtly diſcharge their duty in ſpeaking of the characters of thoſe ſervants who have quitted their ſervice.

ROOKE J. I am of the ſame opinion. It does not appear to me that ſufficient grounds have been diſcloſed to induce us to diſturb the verdict in this caſe. But I wiſh to have it underſtood as my opinion, that a maſter may at any time, whether aſked or not, ſpeak of the character of his ſervant, provided that he ſpeak in the honeſty of his heart, and that an action cannot be maintained againſt him for ſo doing. In ſupport of this opinion the caſe of *Bell* v. *Thatcher*, *Vent.* 275, may be referred to, where Sir *Matthew Hale* ſays, if ſuch actions could be ſupported a man ſhould not ſpeak diſparagingly of a cook or a groom but an action would be brought. At the ſame time maſters are not warranted in ſpeaking ill of their ſervants from heat or paſſion. If this caſe reſted merely on the letter written to Mr. *Hand* by the Defendant, I ſhould be of opinion that the action was not maintainable. But it appears that the Plaintiff and Defendant parted in anger with each other, and that thereupon the latter ſent officiouſly to Mr. *Holland*, to ſtate to him what he thought of the Plaintiff, and to prevent Mr. *Holland* from giving him a character. I agree with my Lord, that the Defendant would have been warranted in communicating any thing of a criminal nature done by the Plaintiff which had come to his knowledge. But the charge made againſt the Plaintiff, though not of a very grievous nature, yet was juſt ſufficient to prevent his getting a new place, and was ſuch as convinces me that it was made in conſequence of the anger conceived againſt him in the Defendant's mind. The caſe therefore ſtands thus; the Plaintiff and Defendant parted in heat and anger with each other, and the latter has given the former a character, which, from the evidence in the cauſe, he does not appear to have been warranted in giving him.

CHAMBRE J. I own I cannot entertain a doubt reſpecting the line of conduct which the Court ought to purſue upon this occaſion. I not only think we are bound not to diſturb this verdict, but I will add, that if I had been upon the jury I ſhould have concurred in the verdict. Nor do I think we can at all take into our conſideration any paper which may have been ſince publiſhed by the Plaintiff; though, if it had been publiſhed before the trial, and had influenced the minds of the jury, that would have been

1803.
ROGERS v. CLIFTON.

a ſufficient reaſon for ſetting aſide the verdict, and puniſhing the parties concerned in ſuch publication. On the ſecond count of the declaration in this caſe no ſpecial damage is proved or laid; I conſider the caſe therefore as reſting entirely on the firſt count, and if the Plaintiff chooſes to enter up his judgment generally, he will run the riſk of having it ſet aſide. We need not conſider whether the words made uſe of by the Plaintiff, when giving the character of the Defendant, are in themſelves actionable or not; for it is alleged in the firſt count, and was proved at the trial, that the Plaintiff, in his letter to Mr. *Hand*, called the Defendant a lazy, impertinent fellow, and that Mr. *Hand*, in conſequence, refuſed to take him into his ſervice. I take the law to be well ſettled, that where a maſter is applied to for the character of a ſervant, the former is not called upon in an action to prove the truth of any aſperſions thrown out by him againſt the latter, but that it lies upon the ſervant to prove the falſehood of the aſperſions thrown out againſt him. In ſuch caſe the maſter is juſtified, unleſs the ſervant prove expreſs malice in the act of the former. Beſides the caſes cited at the bar, I will refer to the caſe of *Lowry* v. *Aikenhead, et Ux. Mich.* 8 *Geo.* 3. before Lord *Mansfield.* In that caſe the rule laid down by Lord *Mansfield* was, that where a perſon intending to hire a ſervant applies to his former maſter for a character, the maſter is not bound to prove the truth of the character which he gives; for what he ſpeaks of the ſervant he does not ſpeak officiouſly, but only diſcloſes that which reſts in his own knowledge alone; but, that where a maſter ſpeaks ill of a ſervant who has quitted his place, without any previous application having been made to him, there he muſt plead and prove the truth of the character in juſtification. Indeed the qualification of the rule may be collected from the words uſed by Mr. Juſtice *Buller* in his law of *Niſi Prius*, when ſpeaking of the caſe of *Edmonſon* v. *Stevenſon*; for he lays it down, that where words are ſpoken in confidence, and without malice, no action lies; he then refers to the caſe of *Edmonſon* v. *Stevenſon*, where the words being ſpoken of a ſervant by her miſtreſs on application for the character of the ſervant, it was held by Lord *Mansfield*, that malice ſhould not be implied from the occaſion of ſpeaking, but ſhould be directly proved. And the ſame law had been acted upon in the caſe of *Haver* v. *Dawſon*, *Bull. N. P.* p. 8, where an action having been

brought

brought againſt a man for warning his friend reſpecting the circumſtances of the Plaintiff, *Pratt* Ch. J. directed the jury, that though the words were otherwiſe actionable, yet, if they ſhould be of opinion that they were not ſpoken out of malice, but in confidence and friendſhip, and by way of warning, they ſhould find the Defendant not guilty; which they did. So in this caſe, if Sir *Gervas Clifton* had been intimate with Mr. *Holland*, and had gone to him in confidence to communicate what had paſſed between himſelf and the Plaintiff, he would have redeemed himſelf from the imputation of malice. But that does not appear to have been the caſe here. What is there in the nature of the charge adduced againſt the Plaintiff by Sir *Gervas Clifton* which required ſuch officious interference on his part? Had he been robbed by the Plaintiff, it would have been very reaſonable that he ſhould go, even to a mere ſtranger, to tell him what in common honeſty he would have been bound to tell, and to warn him againſt taking the Plaintiff into his houſe. A caſe of that kind would have excuſed the Defendant; but here the charge of lazineſs and impertinence was of too ſlight a nature to warrant the officious interference of Sir *Gervas Clifton*, and indeed no great harm would have enſued from the Plaintiff's obtaining another place. Had the caſe reſted upon the mere circumſtance of the letter written by the Defendant to Mr. *Hand*, the Plaintiff could not have ſupported his action without proving malice in Sir *Gervas Clifton*. But it does not reſt on that alone; he had previouſly told the ſame things to Mr. *Holland* which he wrote to Mr. *Hand*, and he had deſired the former not to give the Plaintiff a character. I think the inducement to Sir *Gervas Clifton* to do all this was the quarrel which had taken place between himſelf and the Plaintiff at parting. Conſidering therefore, as I do, the quarrel as the real cauſe of the charge made againſt the Plaintiff, and ſeeing ſo much officious interference on the part of the Defendant, I am quite clear we ought not to grant a new trial.

Rule diſcharged.

1803.

Dec. 1st.

The King *v.* Taylor.

If a servant receive money for his master in the county of *A.*, and being called upon to account for it in the county of *B.*, there deny the receipt of it, he may be indicted for the embezzlement in the latter county.

This was an indictment in the county of *Middlesex*, against the prisoner *William Taylor*, for, that he, being the servant of one *James Barker*, did receive and take into his custody certain monies, to wit ten shillings, for and on account of his said master; and having so received and taken into his possession the said sum of money, for and on account of his said master, he the said *W. T.* fraudulently and feloniously did embezzle and secrete the same, and so did steal from his said master the said sum of ten shillings, the money of the said *Jas. Barker*, for whose use and on whose account the same was delivered to, and paid into the possession of the said *W. T.* against the form of the statute.

At the trial at the *Old Bailey*, before *Heath* J. and *Thomson* B., it appeared that the prosecutor was a fishmonger in *Drury-lane*, and the prisoner was his servant; that on the 27th of *August* the prisoner was sent with 100 herrings to *Cross-street*, *Blackfriars-road*, in the county of *Surry*, to a Mrs. *Stevens*, who had agreed to buy them for ten shillings, which she was to send back by the prisoner, and the prosecutor told the prisoner he was to receive ten shillings for the herrings; that he was sent with them about six o'clock in the evening, and delivered them to Mrs. *Stevens*, who paid him ten shillings for them, and the prisoner returned about eight o'clock, when his master asked him if he had brought the money; that the prisoner said, No, for that Mrs. *Stevens* had not paid him; that he never accounted for the money; that the prosecutor paid him his weekly wages (it being on a *Saturday*), and that the prisoner was to have returned on *Monday* as usual, but did not. It was contended on the part of the prisoner, that he was only liable to be indicted in the county of *Surry*, where the money was received. The prisoner was found guilty, and the point was reserved for the opinion of the Judges.

On this day the opinion of the Judges was delivered at the *Old Bailey*, by

Lord Alvanley Ch. J. At the trial it was contended, that under the circumstances of this case the prisoner could only be indicted in the county of *Surry*. The prisoner, however, was found guilty,

1803. The King v. Taylor.

guilty, and the question was reserved for the consideration of the Judges. They have considered the question, and are unanimously of opinion, that the prisoner has been rightly convicted. This is the second case which has arisen upon the 39 *Geo.* 3 *c.* 85., in which doubts have occurred respecting the place where the offence ought to be charged to have been committed. The first was the case of *The King* v. *Hobson*, tried before Mr. Justice *Chambre*, at *Shrewsbury*, in the county of *Salop*, which is reported in 1 *East's P.C. Addenda*, p. xxiv. In that case the prisoner had received the money in the county of *Salop*, and denied the receipt of it to his master in the county of *Stafford*, and when he afterwards went into the county of *Salop* persisted in that denial. The result of the opinion of the Judges, as stated in the report, was this: "Most of them thought that, as in the case of larceny at common law, so in this, where the statute declared the offence to be of the same kind, the subsequent conduct of the prisoner in not accounting to his master, and denying the receipt of the money, was evidence to shew that the original taking was with intent to secrete and embezzle, and so to steal within the meaning of the statute; and the more so as the act of secreting was a negative act. And some considered that the offence was triable in either county, as referable to the original taking in the one, and the not accounting but denying the receipt when called upon in the other." If any doubts could arise in that case, they certainly do not occur here. In that case there was strong evidence that the prisoner began to determine to embezzle in the county of *Salop*, and there was likewise a clear execution of that determination in that county, though, it was said, the not accounting arose in the county of *Stafford*, until which it might be argued that the act of embezzling was not complete. The Judges, however, were of opinion, that there was sufficient evidence of a beginning to embezzle in the county of *Salop* to make the offence triable in that county. In the present case no doubt can be entertained. The prisoner being sent over *Blackfriar's-bridge* into the county of *Surry*, there received ten shillings for his master. The receipt of that money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money to his own use until after he had returned into the county of *Middlesex*. It was not proved that the money ever was embezzled until the prisoner was in the

1803
The King v. Taylor.

county of *Middlesex*. In cases of this sort the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by shewing an intention in the receiver to appropriate the thing to his own use. Thus, if a servant receive a horse for his master, and sell it before he gets out of the county where he first received it, it might be said that he is guilty of the whole offence in that county. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away. In such a case as this therefore, even if there had been evidence of the prisoner having spent the money on the other side of *Blackfriar's-bridge*, it would not necessarily confine the trial of the offence to the county of *Surry*. But here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could with certainty say that the prisoner intended to embezzle the money. In this case there was no evidence of the prisoner having done any act to embezzle in the county of *Surry*, nor could the offence be complete, nor the prisoner be guilty within the act, until he refused to account to his master. We are therefore of opinion, that the prisoner was properly indicted in the county of *Middlesex*.

[Mr. Justice *Heath* was absent during the whole of this Term from indisposition.]

END OF MICHAELMAS TERM.

CASES

ARGUED and DETERMINED

IN THE

Courts of COMMON PLEAS,

AND

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the Forty-fourth Year of the Reign of GEORGE III.

1804.

HAYNES *v.* BIRKS.

Jan. 27th.

THIS was an action brought against the Defendant, as indorser of a Bill of exchange.

A bill indorsed in blank, and deposited by the holder with his bankers, became due on *Saturday*, and was presented for payment about two o'clock on that day. Payment being refused, the bill was noted and again presented between nine and ten in the evening by a notary. On *Monday* the bankers informed the holder that the bill was dishonoured, who on *Monday* about noon gave notice to the indorser. The holder lived at *Knightsbridge*, and the indorser in *Tottenham-Court Road*. Held that this notice was sufficient to entitle the holder to recover against the indorser.

The cause was tried before *Rooke* J. at the *Westminster* Sittings after last *Michaelmas* Term, when it appeared that the bill in question, which was indorsed in blank, being due on *Saturday* the 1st of *October*, was presented for payment about two o'clock on that day at the house of the acceptor, by a clerk of Messrs. *Wilkes* and Co. of the Poultry, the Plaintiff's bankers, in whose hands it had been placed by the Plaintiff; that payment being refused, the

bill

1804.
Haynes v. Birks

bill was noted and again presented between nine and ten in the evening of the same day by a notary, who was informed that the acceptor was in the King's Bench prison; that the bankers on *Monday* the 3d sent the bill to the Plaintiff, informing him that it was dishonoured, who gave notice of the non-payment to the Defendant on *Tuesday* the 4th about noon; that the Plaintiff lived at *Knightsbridge*, and the Defendant in *Tottenham-Court Road*. On this evidence it was objected that the Defendant was discharged for want of notice of the non-payment being given within reasonable time. A verdict was taken for the Plaintiff, with liberty to the Defendant to move that a nonsuit should be entered.

Accordingly, *Best* Serjt. moved* for a rule *nisi*. The bill having been dishonoured at two o'clock on *Saturday* the 1st of *October*, notice of the non-payment should have been given to the Defendant on *Monday* the 3d of that month at farthest. It was expressly laid down in *Tindall* v. *Brown*, 1 *T. R.* 167, that reasonable time, as applied to bills of exchange, is a question of law; and it has been established by several cases, that where the parties live in the same town, notice must be given on the next day at farthest, and where they do not live in the same town, by the next post. In *Tindall* v. *Brown*, the note having been dishonoured on the 5th of *October*, notice given on the 7th was holden to be too late. And in *Nicholson* v. *Gouthitt*, 2 *H. Bl.* 609, the same was holden where the note became due on the 3d of *October*, and notice was not given till the 6th. The bill therefore having been dishonoured on *Saturday* the 1st, and notice not having been given till *Tuesday* the 4th, such notice is out of reasonable time, even considering *Sunday* as no day. It is no answer to this objection that the bankers did not return the bill to the Plaintiff until *Monday* the 3d, for if they have been guilty of neglect, the Plaintiff must seek his remedy against them. The bill having been dishonoured at two o'clock on *Saturday*, it was the duty of the bankers immediately after noting it, to return it to the Plaintiff the same day. The indorser is not to be prejudiced by the circumstance of the holder having put the bill into the hands of his bankers, for in *Peach* v. *Burgess*, *cit.* 1 *T. R.* 407. Lord *Mansfield* said, "it was a strict rule of law that notice must be given, and it must be adhered to in every case. The bankers can only be considered as the agents of the Plaintiff; either therefore they should have given

due

due notice to the Defendant, or have returned the bill to the Plaintiff time enough to have enabled him so to do. 1804. HAYNES v. BIRKS.

The Court inclined to refuse a rule to shew cause, but said they would mention the case to the other Judges and intimate their opinion on the next day.

Accordingly, Lord *Alvanley* Ch. J. on the next day said, In this case it has been insisted for the Defendant, that reasonable notice was not given to him of non-payment by the acceptor, and two cases have been cited to shew that three days between the non-payment and the notice is too much. It is perfectly true, that in each of those cases three days did intervene between the non-payment and the notice, but in neither of those cases is it stated, as the fact is in this, that the last day of payment was on a *Saturday*. Reasonable diligence in giving notice according to the course and habit of persons in trade is absolutely necessary, and no excuse can be accepted if such reasonable diligence be omitted, unless as between the holder and the drawer, where the latter is proved to have had no effects in the hands of the acceptor. We lay entirely out of our consideration the circumstance of the acceptor being in the King's Bench prison, and mean to decide the case as if he were solvent. It has been argued, that the bankers were the agents of the Plaintiff, and that the Defendant was entitled to the same notice as if the bill had remained in the Plaintiff's hands. We have conversed with some of the other Judges upon this point, and they agree with us in thinking, that if we were so to deal with bills of exchange in the hands of bankers, we should put an end to the practice of employing them to receive payment on the bills of their customers. As soon as the banker is informed of the non-payment of a bill it becomes his business to acquaint his principal of that circumstance; and I wish to be understood to say, that if a bill be returned to a banker he is bound to give notice to his principal that very day, if he can do so by using ordinary diligence. But in this case it was impossible for the bankers on *Saturday* night to give notice to the Plaintiff, since the bill was not presented by the notary till between nine and ten o'clock. On *Sunday* of course they were not bound to do so. And on *Monday* they did apprise the Plaintiff of the non-payment. It does not appear at what time on *Monday* the Plaintiff received the notice. The Plaintiff was not bound to be at home the whole of the day: and supposing him

1804. HAYNES v. BIRKS.

him to have returned home late on that day, he was not bound to fend a fpecial meffenger to the Defendant; if he informed the Defendant by the courfe of the poft it is fufficient. Certainly he was bound to write by the two-penny poft on *Monday*, and fuppofing him to have done fo, the Defendant would only receive his letter on *Tuefday*. Now it appears that on *Tuefday* he did receive the notice; and we cannot fo nicely meafure the minutes as to confider whether the precife time of the receipt correfponds with the time at which a letter fent by the poft on *Monday* night would arrive. The cafe of *Leftley* v. *Mills*, 4 *T. R.* 170, which was mentioned at the bar (*a*), to fhew that the bankers could not give notice on *Saturday* becaufe the acceptor had the whole of that day to pay the bill, does not fatisfy me; and it is obfervable that the opinion thrown out by Lord *Kenyon* was not affented to by Mr. Juftice *Buller*. The two cafes cited in fupport of this application were *Nicholfon* v. *Gouthitt* and *Tindal* v. *Brown*. In the former cafe, though the bill was due on the 3d of *October* it was not prefented till the 6th, though all the parties lived near each other. Lord Chief Juftice *Eyre* was of opinion that under the circumftances of that cafe notice might be difpenfed with. But from that cafe it does not appear that the day on which the bill became due was a *Saturday*, and that it was prefented fo late as to preclude the poffibility of giving notice on that day. In *Tindal* v. *Brown* the Court was of opinion, that a whole day had been improperly given. I do not think that any one has a right to complain that the holder of a bill of exchange employs a banker to receive it, nor is there any law which requires notice to be given within any certain fixed time. Notice need not be given with all the difpatch that can poffibly be ufed, but it muft be given with all the difpatch that can reafonably be expected.

Heath and *Rooke* Js. concurring,

Beft Serjt. took nothing by his motion.

(*a*) By *Onflow* Serjt. who had been Counfel for the Plaintiff at the trial.

JARRET *v.* CREASY.

Jan. 31st.

Time for putting in bail expired on the 30th, Defendant on the 31st moved to justify, pursuant to a notice previously given. Held that the Plaintiff was entitled to the costs of preparing to move for an attachment.

TIME for putting in bail having expired on the 30th of *January*,

Best Serjt. on this day (the 31st) moved to justify.

Shepherd Serjt. opposed the justification, insisting that the Plaintiff was entitled to the costs of moving for an attachment for which instructions had been given.

Best urged that the Defendant was at liberty to justify bail at any time before the attachment was obtained, that the Plaintiff was sufficiently apprized by the notice of justification of the Defendant's intention to justify this day, and that, as the Court never allowed any advantage to be taken of the priority of motion on the same day, the instructions for the attachment ought not to have been given.

But *The Court* thought the Plaintiff was entitled to the costs of preparing to move for the attachment, since he could not be certain whether the Defendant would proceed upon his notice of justification.

Accordingly *Best* undertook to pay those costs, and was allowed to justify.

HODGKINSON *v.* SNIBSON.

Feb. 3d.

The Court will not stay proceedings in replevin upon payment of costs on the application of the Defendant.

BAYLEY Serjt. moved for a rule to shew cause why the proceedings in an action of replevin should not be stayed on payment of costs by the Defendant.

The declaration was general, and did not assign any special damage. The Defendant made cognizance as bailiff of *Paul Joddrell* Esq. lord of the manor of *Workswort*h, and acknowledged distraining on the Plaintiff as constable of the township of *Cromford*, for palfrey rent, to which several pleas in bar were pleaded.

The Court thought that both parties were actors in replevin, and that the Plaintiff had a right to his judgment.

Bayley took nothing by his motion.

1804.

Feb. 3d.

CHALMERS and Another *v.* BELL.

If a *Swedish* Ship be insured at and from her loading port in the *East Indies* to *Gottenburgh*, and part of the cargo be laden in a *British* port in the *East Indies*, the insured cannot recover, the voyage being in contravention of the navigation laws.

THIS was an action on a policy of insurance on goods by the ship *Resolution*, warranted *Swedish* ship and property, at and from the ship's loading port or ports in the *East Indies*, *Persia*, *China*, or elsewhere beyond the *Cape of Good Hope* to *Gottenburgh*, with liberty to touch, stay, or trade, at all ports or places what and wheresoever on this and at the other side of the *Cape of Good Hope*, as interest should appear. The cause was tried before Lord *Alvanley* Ch. J. at the *Guildhall* Sittings after Trinity Term 1802, when the jury found a verdict for the Plaintiffs, subject to the opinion of the Court upon a case, which stated (among other things not material to the point upon which the decision ultimately turned) that the Plaintiffs, merchants in *London*, were agents of a mercantile society called the *Swedish Asiatic* Company, resident at *Gottenburgh* in *Sweden*, and using the firm and style of *Anders Anderson* and Co. That in 1794, this society having engaged *Pendock Neale*, an *Englishman* by birth (but who had obtained letters of burghership in *Sweden*) in the double capacity of captain and supercargo of their *Swedish* ship the *Resolution*, sent him in *October* 1795 in this ship to *India* upon a general speculation, for the purpose of traffic. That in the prosecution of this adventure, captain *Neale* having been at *Tranquebar* and *Manilla*, where he took in the greatest part of his cargo, arrived at *Madras*, and there obtained of the two *British* houses, *Kindersley*, *Watts* and Co. and *Latour* and Co. part of the cargo upon which the policy was effected, and there loaded the same on board the *Resolution*. That the goods shipped at *Madras* were entered and cleared at the custom-house of that port, and that the said ship was likewise entered inwards and cleared outwards at the same port. That on the first of *April* 1797, the *Resolution* sailed from *Madras* on her voyage to *Europe*, having on board, as part of her cargo, the goods which had been purchased at *Madras*, and also the goods taken on board at *Tranquebar* and *Manilla*; and that on her voyage home she was captured by a *French* privateer and condemned.

The question for the opinion of the Court was, Whether the Plaintiff was entitled to recover?

1804. CHALMERS and Another. v. BELL.

Lens Serjt. for the Plaintiff. The only question is, Whether, as part of the goods insured were taken on board the *Resolution*, a *Swedish* vessel, at *Madras*, the voyage is to be considered illegal, as being in contravention of the navigation laws 12 *Car*. 2. *c*. 18. *s*. 1, and 7 & 8. *Will*. & *Mar*. *c*. 22. *s*. 2. the former of which enacted, that "No goods should be imported into or exported out of any lands, islands, plantations, or territories of his Majesty in *Asia*, *Africa*, or *America*, in any other ships but such as belonged to the people of *England*, *Ireland*, *Wales*, or *Berwick upon Tweed*, or were of the built of and belonging to any of the said lands, islands, plantations, or territories;" and the latter, that "No goods should be imported into or exported out of any colony or plantation of his Majesty in *Asia*, *Africa*, or *America*, in any ship not of the built of *England* or *Ireland*, or the said colonies and plantations, and wholly owned by the people thereof?" This question is supposed to have been settled by the case of *Morck* v. *Abel*, *ante*, p. 35; but the point was there rather taken for granted than decided, the argument having turned upon the right to recover the premium, supposing the insurance to have been illegal. It may be doubted, however, whether the above provisions of the navigation laws, so far as they relate to the trade of foreigners, to and from the *British* possessions in *India*, were not repealed by the 33 *Geo*. 3. *c*. 52. The 138th section of that act having prohibited in general terms all his Majesty's subjects from sending the produce or manufactures of the *East Indies* or *China* to *Europe* in any other manner than that pointed out by the act, it is provided in *s*. 139, that the said restriction shall not preclude the servants of the Company or free merchants from buying any goods in *India* and selling the same again in *India* to the subjects of foreign states, or from acting as agents or factors in the importing or exporting, buying or selling goods in *India* for or on the account *bonâ fide* of any foreign company or any foreign merchant; and by *s*. 146, so much of the 21 *Geo*. 3. *c*. 65 as prohibits the servants of the Company, or other *British* subjects in *India*, from lending money to any foreign company, or foreign *European* merchants, or to purchase goods in *India* for and on account of any such companies or merchants, or from being concerned in lending money or purchasing goods to furnish any such companies or merchants with the credit of such bills of exchange as are mentioned in that act, is thereby repealed.

1804.

CHALMERS and Another v. BELL.

These provisions plainly recognize a right in foreign merchants to import and export to and from *India*, and though they do not in terms repeal the operation of the navigation laws with respect to foreigners trading to *India*, yet they must be considered as conferring on foreigners the right of that trade in which they authorize *British* subjects to assist them. It is true that the 37 *Geo.* 3. *c.* 117, which expressly authorizes this trade by foreigners, and which passed on the 19th of *July* 1797, subsequent to the sailing and capture of the *Resolution*, is not a declaratory but an enacting statute. Yet, if it should appear that, according to the true construction of the 33 *Geo.* 3. *c.* 52, the prohibitions of the navigation laws were already done away in respect of foreigners trading to the *East Indies*, they ought not to be prejudiced by a superabundant act of the Legislature in their favour.

Best Serjt. *contrà*. Though the provisions of a subsequent statute may operate as a repeal of a former one without express words for that purpose, yet a subsequent statute never can have that effect, unless it be so inconsistent with the former that they cannot stand together. But here no such inconsistency appears. Though the 33 *Geo.* 3. authorizes foreigners to buy and sell in *India*, it does not authorize them to export commodities in any manner different from that to which all exportation from that country was before confined by the navigation laws. In the case of *Morck v. Abel*, *ante*, 35, where an insurance was effected upon a *Danish* ship at and from *Bengal* to *Copenhagen*, and it appeared that the cargo was taken on board at *Calcutta*, the voyage was admitted to be illegal, and the Court held, that the insured could not recover.

Lord ALVANLEY Ch. J. Taking it for granted that the *East Indies* are to be considered as *British* colonies within the meaning of the navigation laws, it does not appear to me that the clauses which have been cited from the 33 *Geo.* 3. go the length of repealing the restriction of those laws with respect to the *East Indies*. It is true that the rigour of those laws had been considerably relaxed in practice with respect to the *East Indies* previous to the 37 *Geo.* 3., but the laws still remained in force. The doctrine of destitution has no existence in the law of *England*, though it has in that of *Scotland*. It is urged that the clauses of the 33 *Geo.* 3. are inconsistent with the provisions of the navigation acts; for it is said that the Legislature, by empowering foreigners to trade to and

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from *India*, have authorized them to carry on their trade in their own ships. But the Legislature, by empowering foreigners to buy and sell within the limits of the *East India Company's* charter, without being subject to penalties, are not to be considered as having repealed any part of those laws which were made for the encouragement of *British* navigation. The right to buy and sell may be given to foreigners, and yet the obligation to export in *British* ships may remain. We will look into the clauses, but unless we should have occasion to alter our opinion, we think that a nonsuit must be entered.

On this day Lord *Alvanley* said, that *the Court* had looked into the acts of parliament, and were of opinion, that the navigation laws were not repealed with respect to the *East Indies* by the clauses in the 33 *Geo.* 3.

Per Curiam. Nonsuit to be entered.

(IN THE EXCHEQUER CHAMBER.)

HANKIN *v.* BROOMHEAD, One, &c. in Error. *Feb.* 4th.

Judgment by default having been suffered in an action on a bond, the Plaintiff entered up judgment for the penalty, together with 9*l.* 10*s.* for damages and costs. A writ of inquiry having been executed, damages were assessed at 1115*l.* 13*s.* 4*d.* and costs 40*s.* And the Plaintiff entered up another judgment for those damages, together with 31*l.* 6*s.* 8*d.* for costs; but afterwards entered a *remittitur* on the roll for the costs. Held that the second judgment was erroneous.

DECLARATION in the *King's Bench* in debt on bond for 2000*l.* concluding to the Plaintiff's damage of 100*l.* Judgment having been suffered by default in *Easter* Term 1799, the following judgment was entered: "Therefore it is considered that the said *Esther Hankin* recover against the said *John Broomhead* the said debt, and also 9*l.* 10*s.* for her damages which she hath sustained, as well by reason of the detaining the said debt, as for her costs and charges about her suit in this behalf expended, by the Court of our Lord the King, now here adjudged to the said *Esther* by her assent; and the said *John* in mercy," &c. In *Easter* Term 1800, the Plaintiff below proceeded to assign breaches under the 8 & 9 *Will.* 3. alleging, that the bond declared on was in the penal sum of 2000*l.* conditioned for the performance of certain covenants, which had been broken by the Defendant below. Upon this assignment of breaches a writ of inquiry was awarded and executed before the Chief Justice, and damages were assessed at the sum of 1115*l.* 13*s.* 4*d.* over and above the costs of suit;

and

1804.

HANKIN v. BROOMHEAD.

and for those costs 40s. The record, after stating the return of the writ of inquiry, and continuances to a particular day, proceeded thus: "At which day, before our said Lord the King at *Westminster*, comes the said *Esther* by *T. P.* her attorney, and thereupon all and singular the premises being seen, and by the Court of our said Lord the King before the King himself, now here fully understood, and mature deliberation being thereupon had, it is considered by the same Court here, according to the statute in such case made and provided, that the said *Esther* do recover against the said *John* her damages aforesaid, in form aforesaid found, and also 31*l.* 6*s.* 8*d.* for her further costs and charges by her about her suit in this behalf expended, by the Court of our said Lord the King now here adjudged to the said *Esther*, and with her assent, which said costs, charges, and damages, and further costs and charges in the whole amount to 1158*l.* 10*s.*; and the said *John* in mercy, &c. And hereupon the said *Esther* freely here in court remits to the said *John* the said several sums of 40*s.* and 31*l.* 6. 8*d.* in form aforesaid found and awarded to the said *Esther* for her costs and charges aforesaid; therefore as to those costs and charges let the said *John* be acquitted and go thereof without a day," &c.

The Defendant below having brought a writ of error, assigned for error, "That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said *Esther* to have or maintain her aforesaid action thereof against him to the extent for which the judgment aforesaid is given, nor support or warrant the judgment so as aforesaid given in form aforesaid; there is also error in this, to wit, that by the declaration aforesaid, on which the said judgment is given, no more than a debt of 2000*l.* and 100*l.* damages for the action thereof are claimed, and yet, by the record aforesaid, it appears that by the judgment aforesaid, in form aforesaid given, it is adjudged that the said *Esther* recover against the said *John*, not only her said debt of 2000*l.* and also 9*l.* 10*s.* for her damages which she had sustained as well on occasion of the detaining the said debt as for her costs and charges by her about her suit in that behalf expended, but also that the said *Esther* recover against the said *John* her damages to the amount of 1115*l.* 13*s.* 4*d.* assessed by the jury aforesaid on the within mentioned inquisition, as the damages sustained by the said *Esther* on occasions of the breach of the condition of the said writing obligatory in the said declaration mentioned, which said debt and damages so

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by the said judgment awarded and adjudged to be recovered by the said *Esther* against the said *John*, amount in the whole to the sum of 3,125*l.* 3*s.* 4*d.*, being a much greater sum than the full amount of the debt demanded and the damages laid in the said declaration and thereby sought to be recovered, therefore in that there is manifest error; there is also error in this, to wit, that by the record aforesaid, it appears that the judgment aforesaid, in form aforesaid is given for the said *Esther* against the said *John* for greater and other sums and to a larger amount than the full amount of the debt demanded, and all the damages laid in and by the declaration aforesaid, therefore in that there is manifest error; there is also error in this, to wit, that there are two distinct judgments given by the Court on the premises, notwithstanding the first of such judgments purports to be final; and there is also error in this, that it does not appear in and by the suggestion made by the said *Esther*, but that the said *John Wilkinson* and *Robert Woodgate*, or one of them, did transfer and pay to the said *Esther* the said stock in the said indenture mentioned, at the time therein mentioned, according to the form and effect of the said condition."

Raithby for the Plaintiff in error. If in the present case the Defendant in error in entering up judgment has deviated from the course pointed out by the 8 & 9 *Will.* 3. *c.* 11. he will be unable to maintain his judgment, notwithstanding he may be able to shew that in this particular instance no injustice will be done; for since the cases of *Roles* v. *Rosewell*, 5 *T. R.* 538. and *Hardy* v. *Bern*, 5 *T. R.* 636. the provisions of the statute of *Will.* 3. have been held to be compulsory upon the parties. The 8th section of that statute consists of two parts applicable to this subject. It first enacts, that if judgment shall be given for the Plaintiff on demurrer, or by confession on *nil dicit*, the Plaintiff may suggest breaches, and a writ shall issue to the Sheriff, and the Judges of assize shall make return thereof to the court from whence the same issued. It then proceeds to say, that in case the Defendant, *after such judgment*, and before execution, shall pay into court the damages and costs, execution shall be stayed. The word "judgment" here, must be taken to mean the judgment before named, *viz.* the common law judgment. The statute therefore does not enable the party, after having first obtained his common law judgment, to enter a second equitable judgment, according to the cir-

1804. Hankin v. Broomhead.

cumſtances of the caſe, but only to obtain an equitable execution upon the firſt judgment, ſuch judgment being reſtrained in its effect againſt the Defendant, by the finding of the jury upon the breaches ſuggeſted. It is incumbent on the party therefore, as often as he is aggrieved to aſſign breaches, but not as often as he is aggrieved to enter up judgments; and if the mode adopted by the Defendant in error ſhould prevail, the ſubſequent judgments, inſtead of reſtraining the firſt judgment, will only be cumulative, and give the party a right to ſo many executions in addition to that upon the firſt judgment.

Lawes contrà. The argument for the Plaintiff in error rather tends to ſhew that the ſecond judgment is unneceſſary than that it is unjuſt: and indeed, as the Plaintiff in error only prays that the judgment may be reverſed, when in fact there are two judgments upon record, it may be objected that he is not very regular in the manner of appearing before the Court; for if it be uncertain to which of the two judgments the writ of error applies, it is bad. The Plaintiff below was entitled to take his common law judgment notwithſtanding the 8 & 9 *Will.* 3. *Goodwin* v. *Crowle*, *Cowp.* 357. in which caſe Lord *Mansfield* ſays: "The true conſtruction and ſubſtantial juſtice of the act is, that the penalty ſhall not be levied in any caſe whatever; but the judgment in this caſe being upon demurrer, it muſt be as uſual to recover the debt;" and he then proceeds to ſtate, that the time to make an application is when the party takes out execution for the whole penalty. Accordingly, in that caſe, the common law judgment which had been entered for the Plaintiff below was affirmed in error. This ſhews therefore, that the firſt judgment on this record is good; and ſhould the Court hold the ſecond judgment to be erroneous, their deciſion will not affect the validity of the firſt. The ſtatute of *Will.* 3. was paſſed to mitigate the rigour of the common law judgment. But it expreſsly ſays, that ſuch judgment ſhall ſtand as a ſecurity for future breaches. The Courts therefore are not precluded from giving a ſecond judgment, but may follow what mode they pleaſe, provided they do that which is conſiſtent with the object that the legiſlature had in view. The fair implication therefore is, that the Court may regulate the common law judgment by giving to the party a ſecond judgment which may ſecure to him thoſe damages that have been aſſeſſed. The writ of in-

quiry is to be executed before the Chief Justice, and is to be returned to the court. Now for what purpose is this, unless it be for the same purpose for which all writs of inquiry are executed and returned, namely, that the Court may give judgment upon it? Besides, there is a *dies datus* to the party, that he may come to the court and receive judgment. The Defendant below has no reason to complain of this kind of proceeding, for it enables him to come to the court and move in arrest of judgment before execution can be taken out, of which benefit he would be deprived if execution were issued immediately after the assessment of damages. It is true that Mr. Serjt. *Williams* in a note to the case of *Gainsford* v. *Griffith*, 1 *Saund. p.* 58. *note* 1. has given a precedent in a different form from that adopted in this case; but the practice has been to enter up the proceedings in cases under the statute of *Will.* 3. according to the form pursued in this record; and in *Trin.* 40 *Geo.* 3. in a case of *Isherwood* v. *Seddon*, error was assigned upon a record similar to the present, and the judgment was affirmed though without argument.

Cur. adv. vult.

On this day the opinion of the Court was delivered by,

Lord ALVANLEY Ch. J. In this case judgment having gone by default, and having been entered up for the debt and damages, together with the costs, the Plaintiff below proceeded under the statute of *W.* 3. to suggest that the bond declared upon was a bond with a penalty conditioned for the performance of certain covenants, and that he had sustained damage by the breach of those covenants to the amount of 1115*l.* 13*s.* 4*d.* The jury having found that he was so damnified, upon the return of the inquisition to the Court, the Plaintiff below instead of suing out execution for the sum to which he was entitled, asks the Court for a second judgment, not stating it to be in lieu of the first judgment, but only entering a *remittitur* as to the costs. The first judgment therefore remains upon the record in full force. Upon this record errors have been assigned. I am sorry to find that none of the courts have ever been moved as to the proper mode of entering up judgments under the statute of *William* in cases of this kind. At common law no doubt the party was entitled to take his judgment for the penalty in the bond, and the Defendant could only obtain relief through the interposition of a court of equity, which would

direct

1804. HANKIN v. BROOMHEAD.

direct an issue of *quantum damnificatus*, and prevent any execution being enforced for more than the damage actually sustained. To avoid so circuitous a mode of relief, and to afford to parties the benefit of the above equitable execution, the statute of *William* was passed. Mr. Serjt. *Williams*, in his note to *Gainsford* v. *Griffith*, 1 *Saund.* 58. has suggested a mode of entering up the proceedings upon record in cases where a party obtains judgment by default, or upon demurrer, and is obliged to proceed under the stat. of *William* 3; to which I see no objection. The only difficulty in those cases respects the costs of the inquisition, which if he does not obtain he is in a worse condition than he would have been before the statute. Where the Defendant proceeds to issue in the first instance upon the breaches, this difficulty does not occur, for there the *postea* returned is indorsed for the Plaintiff's full damages and costs. Mr. Serjt. *Williams* recommends that in order to obviate that difficulty, the judgment should be suspended till after the return of the inquisition. That however has not been done here, and whatever inconvenience the Plaintiff below may sustain, we cannot assist him. We are of opinion that the second judgment cannot stand; but we rather incline to think that if the costs had not been remitted, the Court of *King's Bench* upon motion might have ordered the master to tax those costs, and then added them to the sum to be levied under the execution. The judgment of this Court therefore is, that the second judgment, with the amercement be reversed, and that the former judgment remain unimpeached.

Judgment accordingly.

Feb. 9th.

NEWMAN *v.* WALTERS.

A ship being in danger, and the captain and part of the crew having made their escape, a passenger at the request of the rest of the crew, took the command and brought the ship safe to port. The merits of the passenger in saving the ship were acknowledged by the owner in a letter to one of the underwriters, wherein he expressed his desire to make him a compensation. Held that the passenger was entitled to sue the owner for salvage.

INDEBITATUS ASSUMPSIT. The first count of the declaration was for "the salvage of a certain ship called the *Betsy*, and cargo of goods, wares, and merchandizes of the Defendant, wherewith the said ship was then laden, which said ship and cargo had before that time struck and stranded in a certain place called *Chichester* *Shoals*,

Shoals, and was then and there saved and safely delivered to the Defendant by the Plaintiff, to wit, at," &c. The second count was for work and labour in and about the saving and preserving, and safely delivering to the Defendant the said ship and cargo so struck and stranded as aforesaid. There was a third count for work and labour generally; and a fourth upon a *quantum meruit* for the same.

The case was tried before Lord *Alvanley* Ch. J. and a special jury at the *Guildhall* Sittings after last *Michaelmas* Term, when it appeared that the Plaintiff, who had been a captain in the merchants' service, went out as a free passenger on board the *Betsey*, of which the Defendant was owner, on a voyage from *Gravesend* to *Saint Kitts*; that she left the *Downs* on the 15th of *April*, and soon after struck on the rocks off *Chichester*; that the ship being in apparent danger, the captain of the ship got into the pinnace, and with three of the crew made his escape; that at this time the pilot was drunk, and the mate, together with the rest of the crew, requesting the Plaintiff to take charge of the ship, he did so, and immediately gave the necessary orders, and was obeyed by all persons on board as captain; that when he first took the command the pilot was about to let go the anchor, by which the ship would probably have been lost, but was prevented by the interference of the Plaintiff; and that the Plaintiff brought the ship safe into *Ramsgate* harbour. Two letters from the Defendant to one of the underwriters were read in evidence, in both of which he expressed his belief that the Plaintiff had been the means of saving the ship, and that in the account of the general average given in by his broker he had put down 200*l.* as the least possible sum which could be given to the Plaintiff by way of compensation, but that whatever more might be allowed to him would afford him satisfaction. It was objected, that under the above circumstances the Plaintiff was not entitled to claim for salvage, and his Lordship rather inclined to that opinion, but directed the jury to consider what compensation the Plaintiff was entitled to. The jury found that the Plaintiff, after the desertion of the ship by the captain, took upon himself the care and management of the ship, which would have been lost but for his exertions, and gave a verdict for 400*l.*

Early in the term a rule *nisi* for a new trial was moved for, first, on the ground that the Plaintiff, under the circumstances of this

1804.

NEWMAN v. WALTERS.

this case, was not entitled to recover any thing; and secondly, on the ground of the jury having given too large a compensation to the Plaintiff, supposing him entitled to recover any thing: and the rule having been granted on the first ground only,

Shepherd and *Heywood* Serjts. now shewed cause. To the exertions of the Plaintiff must be altogether ascribed the preservation of the ship; the only question therefore will be, Whether he did more than as a passenger he was bound to do, and if he did, whether such services entitle him at law to any compensation? If it be contended, that because the Plaintiff was a passenger he is not entitled to salvage, the opinion of Sir *W. Scott* may be referred to, who, in *The Two Friends*, 1 *Rob. Adm. Rep.* p. 285., expressly awarded an higher rate of salvage to a person because he was merely a passenger and not an ordinary seaman. In *The Beaver*, 3 *Rob. Adm. Rep.* 292., Sir *W. Scott*, in apportioning the salvage, considers how far the person there claiming had embarked his services beyond what his duty called upon him to do, and rewards him accordingly. The principle of that decision applies to the present case; for it cannot be denied that the Plaintiff, in his endeavours to save the ship, went beyond what his duty called upon him to perform. And in *The Joseph Harvey*, 1 *Rob. Adm. Rep.* 306. Sir *W. Scott* says, "It may be in an extraordinary case difficult to distinguish a case of pilotage from a case of salvage properly so called; for it is possible that the safe conduct of a ship into port under circumstances of extreme danger and personal exertion may exalt a pilotage service into something of a salvage service." Here the Plaintiff conducted the ship into port under circumstances of extreme danger and personal exertion, his situation on board the ship not calling upon him to risk either. If it be said that salvage only extends to those who come from the shore, or at least from a situation of safety, and not to those who being on board the ship exert themselves to save both themselves and the ship, no such distinction is to be found either in the laws of *Rhodes* or *Oleron*, nor does the language of the old statutes point at it. In *Beawes Lex Merc.* p. 131. salvage is called an allowance for saving the ship or cargo from the dangers of thieves, pirates, or other perils. And in *Vin. Ab.* tit. *Salvage*, the laws of *Oleron* and the laws of *Rhodes* are referred to, from which it appears, that in case of disability of the ship to proceed, those who save part of the cargo

cargo with themſelves are entitled to ſalvage. From whence it may be collected that thoſe on board the ſhip, as well as theſe who come to the ſhip, may claim ſalvage.

Cockell, *Bayley*, and *Beſt*, Serjts. *contrà*. If the Plaintiff be entitled to recover, every other perſon on board who aſſiſted him in conducting the ſhip into port is equally entitled. By his exertions the Plaintiff has undoubtedly rendered the Defendant a conſiderable ſervice, but the queſtion is, Whether it be a ſervice for which he is entitled to a pecuniary compenſation? A man who drains his own lands, and thereby benefits the lands of his neighbour, can demand no compenſation for ſuch a benefit. The caſe of the paſſenger in *The Two Friends* differs from this, becauſe there was a recapture; now with capture the duty of every perſon on board ends; recapture therefore is always ſomething *ultrà* the duty of thoſe who are engaged in it. But in caſes of extreme peril it is the duty of every perſon on board to aſſiſt in ſaving the ſhip. If the plaintiff be not entitled to recover as for ſalvage, he cannot recover as for work and labour done; for though the law implies a promiſe to pay where a benefit has been conferred at the loſs or riſk of a third perſon, yet that is only where the benefit reſults ſolely to the perſon charged, without any participation of the party charging. Here the Plaintiff was benefited by the ſhip being ſaved as well as the Defendant.

After argument the caſe ſtood over till the next day, when the learned judges delivered their opinions.

Lord ALVANLEY Ch. J. (after ſtating the caſe). The queſtion is, Whether the Plaintiff in this action be entitled to recover any thing? I was rather ſurpriſed to hear it contended, that when the perſon who had the command of the ſhip had deſerted her, the Plaintiff, who was a mere paſſenger, was bound to interfere for her ſafety. The crew indeed ought not to deſert the ſhip ſo long as they can poſſibly remain on board, and if the mate in this caſe had ſaved the ſhip by doing what the Plaintiff did, he would not have been entitled to claim a compenſation in the nature of ſalvage. I do not go the length of ſaying, that a paſſenger who is found on board in time of danger is to do nothing; he muſt do works of neceſſity for the preſervation of the lives of all on board. But here the Plaintiff did more than he was called upon by his duty to perform; for when he took upon himſelf the direction of the ſhip he made himſelf reſponſible in the ſame manner as if he had

1804.
NEWMAN
v.
WALTERS.

been maſter. This he was under no obligation to do. In ſumming up this caſe to the jury I ſtated to them, that this was not literally a caſe of ſalvage, but I have ſince been induced to alter that opinion, particularly by what is reported to have fallen from Sir *W. Scott*, 1 *Robinſon's Admiralty Rep.* p. 306. reſpecting the claim of a pilot praying ſalvage; for he there ſays, "it may be in an extraordinary caſe difficult to diſtinguiſh a caſe of pilotage from a caſe of ſalvage properly ſo called; for it is poſſible that the ſafe conduct of a ſhip into a port under circumſtances of extreme danger and perſonal exertion may exalt a pilotage ſervice into ſomething of a ſalvage ſervice." Suppoſe a tempeſt ſhould ariſe while the pilot is on board, and he ſhould go off in a boat to the ſhore to fetch hands, and ſhould riſk his life for the ſafety of the ſhip in a manner different from that which his duty as a pilot required: in ſuch caſe it ſeems to me that he would be entitled to a compenſation in the nature of ſalvage, and I am glad that Sir *W. Scott* appears to entertain the ſame opinion. Without entering into the diſtinctions reſpecting the duties incumbent on a paſſenger in particular caſes, I think, that if he goes beyond thoſe duties he is entitled to a reward in the ſame manner as any other perſon. In this caſe the plaintiff did not act as a paſſenger when he took upon himſelf the direction of the ſhip; he did more than was required of him in that ſituation, and having ſaved the ſhip by his exertions is entitled to retain his verdict in this action.

HEATH J. My Lord has entered ſo fully into this caſe that it will not be neceſſary for me to make many obſervations. The character of a paſſenger differs materially from that of a ſeaman or one of the crew. The paſſenger, in conſideration of an undertaking from the maſter to give him a paſſage, contracts to pay a ſum of money; all the reſidue of the contract is in his favour; the maſter is bound to carry him to his place of deſtination, but the paſſenger may give up his paſſage if he pleaſes, and quit the ſhip, unleſs under very particular circumſtances. If indeed the ſhip be attacked he muſt defend it, and he will be entitled to prize-money. But if the ſhip be in ſuch diſtreſs that ſhe can only make her way by pumping, it is the duty of the crew to keep her alive until ſhe arrive at a place of ſafety; yet if the paſſenger meet with another ſhip at ſea he is at liberty to abandon that on board of which he has taken his paſſage. So here the

1804.

NEWMAN v. WALTERS.

Plaintiff, if he had pleased, might have gone ashore. It does not appear that the weather was stormy, or that there was any other circumstance to prevent him. The merits of the Plaintiff were expressly recognized in a letter from the Defendant, who acknowledged that the ship was saved by his skill. It seems to me therefore, to be the same as if he had given express orders to the Plaintiff for his conduct. *Omnis ratihabitio retro—trahitur et mandato priori æquiparatur.* I am therefore clearly of opinion the Plaintiff is entitled to his verdict.

ROOKE J. Under the special circumstances of this case, I think the Plaintiff is entitled to recover. The Plaintiff, who was a mere passenger, might have gone on shore in the boat without danger, but being desired by the mate and all the crew to stay and take the command of the ship, he did so. This may be considered as a retainer by the only persons who were the agents of the owners at the time. When he comes on shore, one of the owners recognizes his conduct and approves of all that he has done. On this special ground I am clearly of opinion that this action may be supported.

Rule discharged.

HARWOOD and Another, Executors, &c. *v.* LESTER.

Feb. 9th.

A. delivered goods under the value of 40*s.* to a carrier in *London* pursuant to an order from *B.* resident in *Leicestershire*, and *B.* received the goods in the latter county. Held that no action for the goods could be maintained in the county court of *Leicestershire*, and that the court of *Common Pleas* therefore could not stay proceedings in an action commenced in that Court.

ON the last day of last Term a rule was made absolute on the motion of *Williams* Serjt. for staying all proceedings in this action, on the ground of the cause of action being only 1*l.* 1*s.* 6*d.* and therefore not fit to be entertained in this Court, the Plaintiffs having their remedy in the county court. Early in this Term a rule *nisi* was obtained for discharging the above rule, and affidavits were filed to shew that the action was commenced against the Defendant who resided at *Luttershall* in *Leicestershire*, for the value of some casks, in which the Plaintiffs' testator had, according to the Defendant's order, sent down some liquor by a carrier named by the Defendant, and for which casks he refused to pay, though the account for the liquor had been settled by him; and it was thereupon insisted that the cause of action being complete by the delivery to the carrier in *London*, no action could be maintained in the

1804.
HARWOOD and Another v. LESTER.

the county court of *Leicestershire*, the only county court to which the Defendant, from his residence, was liable to be summoned.

Against that rule *Williams* Serjt. now shewed cause. The several cases of *Stean* v. *Holmes*, 2 *Bl.* 754., *Kennard* v. *Jones*, 4 *T. R.* 495, and *Wellington* v. *Arters*, 5 *T. R.* 64., are decisive authorities to shew that the superior courts will not entertain actions for such trifling sums as that sued for in this case. Admitting the principle laid down in the several cases of *Welsh* v. *Troyte*, 2 *H. Bl.* 29., *Tubb* v. *Woodward*, 6 *T. R.* 175., *Busby* v. *Fearon*, 8 *T. R.* 235., and *Smith* v. *O'Kelly* (a), that where the Plaintiff cannot sue in the county court, he may bring his action in the superior courts, however small the debt may be, still they do not apply to this case; for here, though the legal delivery of the casks in question (at least as to many purposes) took place in *London*, yet the actual delivery to the Defendant at *Luttershall* having completed the Plaintiff's right of action in *Leicestershire*, he might have summoned the Defendant to the county court there. If so the application to this Court to stay proceedings was well founded, and this rule must be discharged.

Shepherd Serjt. in support of the rule. The goods which are the subject of the present action being delivered to the carrier in *London*, the cause of action was complete there; indeed so much so, that if they had been embezzled by the carrier before he quitted *London*, or had been lost by him there, he would have been liable to the Defendant. If then the right of action were complete by delivery to the carrier in *London*, the subsequent arrival of the goods in *Leicestershire* to the Defendant could not alter the case, for it did not give him a new right of action. In *Smith* v. *O'Kelly*, this Court refused to interfere, on the ground that the cause of action having arisen at *Newmarket*, the Defendant could not be summoned to the county court in *Middlesex*. Now in this case the sale and delivery in *London* to the carrier who was the agent of the Defendant, completed the Plaintiff's cause of action in *London*, and no subsequent actual delivery to the Defendant himself in *Leicestershire* could take the cause of action out of that county where it was once complete.

HEATH J. intimated that authorities were to be found in the books, to shew that where goods are sent from one county into

(a) *Ante*, vol. i. p. 75.

 another,

another, the cause of action is considered as arising in the county from whence they are sent, and not in that where they are delivered; and he observed, that the right to stop *in transitu*, which was an anomalous right introduced from courts of equity, could make no difference in the principle of law. *The Court* wishing to examine those authorities, desired that the matter might stand over.

And now Lord ALVANLEY Ch. J. said, We have looked into the cases relating to inferior jurisdictions, and are convinced, though not without regret, that we cannot put a stop to the Plaintiff's proceeding in this action, because the Plaintiff's cause of action did not so originate as to give the county court of *Leicestershire* jurisdiction. I rather think the whole cause of action must arise within the jurisdiction of the inferior court, to enable a party to proceed in that court. Now that cannot be contended in this case. Indeed my brothers are of opinion that the goods which are the subject of this action were both sold and delivered in *London*. Unquestionably they were bargained for and sold in a shop in *London*; part therefore if not the whole of the contract arose there. There can be no doubt that the moment the goods were delivered to the carrier in *London*, the Plaintiff's testator might have commenced his action. Can we decide then that there was a period at which the suit might have been well commenced in *London*, and not have been liable to be stopped by the interference of the Court; and yet that by the subsequent event of the actual delivery to the Defendant in *Leicestershire*, we are authorized to stay the proceedings?

Rule absolute for discharging the former rule.

Feb. 10th.

John Poole *v.* Lucy Poole and Others.

Devise to testator's first son by his wife begotten or to be begotten for life, remainder to trustees to preserve contingent remainders; remainder to the several heirs male of such first son lawfully issuing, so as the elder of such *sons* and the heirs male of his body shall always be preferred and take before the younger and the heirs male of his body; remainder to the testator's 2d, 3d, 4th, and all and every other son and sons for their several and respective lives; remainder to trustees, and to preserve, &c.; remainder to the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such *sons*, and the heirs male of his body, shall be always preferred and take before the younger of the same sons, and the heirs male of his and their body and bodies; remainder to the testator's first and other daughters for their lives; remainder to trustees, &c. remainder to the several heirs of their several and respective bodies lawfully issuing, so as the elder of such *daughters*, and the heirs male of her body, shall always be preferred and take before the younger of the same daughters, and the heirs male of her and their body and bodies. There were other clauses in the will, by which after giving an estate for life to the first taker, the testator limited to trustees, &c; remainder to the first and other *sons* of such first taker, and the heirs of their bodies, so as the elder of such sons, and the heirs of their bodies, should always be preferred before the younger of the same *sons* and the heirs male of their bodies. Held that the first son of the testator took an estate tail.

This was a case from the Court of Chancery.

James Poole, by his will bearing date the 6th *February* 1784, gave and devised his freehold and copyhold estates in the words following: "*Item*, All my freehold and copyhold estates called *Blakelow*, within the manor and forest of *Macclesfield* in the county of *Chester*, and all other my real estate whatsoever and wheresoever, and of what nature or kind soever that I shall die possessed of, or entitled unto at the time of my decease, in possession, reversion, remainder, or expectancy, I give, devise and bequeath unto *John Davenport* and *John Edison*, and their heirs; to the use of them and their heirs upon trust, for the several uses, intents and purposes hereinafter mentioned and declared of and concerning the same (that is to say), in trust, that they receive and take the rents and profits of my said estate, for the use and benefit of my first son by *Lucy* my wife, begotten or to be begotten, during his life; and also upon trust to preserve the contingent remainders from being defeated or destroyed, and after his decease in trust for the several heirs male of such first son lawfully issuing, so as the elder of such sons, and the heirs male of his body, shall always be preferred and take before the younger and the heirs male of his body, and for want of such issue, in trust for my second, third and fourth, and all and every other son and sons for their several respective lives; and also upon trust to preserve the contingent remainders from being defeated or destroyed; and after their several deceases in trust for the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such sons, and the heirs male of his body, shall be always preferred and take before the younger of the same sons, and the heirs male of his or their body and bodies, and

for

for want of such issue in trust for my first daughter, and every other my daughter and daughters for their several and respective lives, for their several sole and separate use, free from the power or debts of any husband they may any of them marry; and also upon trust to preserve the contingent remainders from being defeated and destroyed; and from and after their several deceases, in trust for the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such daughters and the heirs male of her body, shall always be preferred and take before the younger of the same daughters, and the heirs male of her and their body and bodies. And I do hereby empower such persons as shall be entitled to the possession of my said estates, to settle by way of jointure upon any woman with whom they may marry, any part of such estates not exceeding the value of 500*l.* *per annum*. And I do hereby direct that my eldest son shall not be entitled to the possession of my real or personal estate till he attain the age of 27 years; but I hereby empower my executors, at their discretion, to allow any sum for his maintenance and education not to exceed 300*l.* *per annum*, till he attain the age of 21 years, and from that time to pay to my said son the sum of 500*l.* *per annum* till he attain the age of 25 years, and from that time the sum of 1000*l.* *per annum* till he attain the said age of 27 years. *Item*, all my freehold and copyhold estate, and all other my real estate whatsoever and wheresoever, and of what nature or kind soever, that I shall die possessed of or entitled unto at the time of my decease, in possession, reversion, remainder or expectancy, and all the rest, residue and remainder of my personal estate, and every part and parcel thereof, after payment of my debts and legacies last mentioned, in failure of such issue by me as aforesaid, and not otherwise, I do hereby give, devise, and bequeath the interest, rents, and profits of the same, and every part and parcel thereof, unto the said *John Davenport* and *John Edison* and their heirs, to the use of them and their heirs, subject to the annuities by me hereby given, in trust that they lay out and invest my said personal estate in the purchase of freehold or copyhold lands, tenements and hereditaments in *England* or *Wales* in their names as aforesaid, to the use of them and their heirs, in trust to and for the several uses, interests, and purposes hereinafter-mentioned of and concerning the same, (that is to say,) upon trust that they permit and suffer my nephew *Thomas Poole*, now residing in the *East Indies*, son of

1804.

POOLE *v.* POOLE and Others.

1804. POOLE v. POOLE and Others.

my nephew *John Poole*, to receive and take the rents and profits of all and every my said estates, for and during his life, subject to and chargeable with the payment of an annuity of 200*l. per annum* to his father the said *John Poole* during his natural life, payable quarterly; and also upon trust to preserve the contingent remainders hereinafter limited, and after his decease, in trust to permit my nephew *Anderton Poole*, son of my late brother *Joseph Poole*, to receive and take the rents and profits of my said estate for his life, subject to the said annuities; and also upon trust to preserve the contingent remainders hereinafter limited; and after his decease in trust for the first and every other son and sons of the body of the said *Anderton Poole*, lawfully to be begotten, successively as they shall be in priority of birth and seniority of age, and the several heirs of their respective bodies lawfully issuing, so as the elder of such sons, and the heirs of his body, shall always be preferred and take before the younger of the said sons, and the heirs of his and their bodies; and for want of such issue, in trust to permit and suffer the said *James Poole*, son of my late brother *Joseph Poole*, to receive and take the rents and profits of my said estates for his life, subject to the said annuities; and also to preserve the contingent remainders hereinafter limited; and after his decease, in trust for the first and every other son and sons of the body of the said *James Poole*, lawfully to be begotten, successively as they shall be in priority of birth, and seniority of age, and the several heirs of their respective bodies lawfully issuing, so as the elder of such sons, and the heirs of his body, shall always be preferred and take before the younger of the same sons, and the heirs of his and their bodies; and for want of such issue, to *John Poole Mair*, son of my neice *Elizabeth Mair*, and his heirs for ever." The testator afterwards died without having revoked or altered his will. He left *John Poole* his only son and heir at law, then an infant under the age of 21 years, and one daughter. The said *John Poole*, the testator's son, has attained the age of 27 years. The testator's copyhold estates were duly surrendered by him to the use of his will.

The question was, What estate *John Poole*, the son of the testator, took under the will of the testator?

Williams Serjt. for the plaintiff, was desired by the Court to argue this case as if the limitations in dispute had created legal estates.

estates.—*John Poole* the Plaintiff took an estate tail. The limitation to *John Poole* in this case amounts to nothing more than a devise to him for life, remainder to trustees to preserve contingent remainders, remainder to the heirs male of his body, and for want of such issue then over. For the words "for as the elder of such sons and the heirs male of his body shall always be preferred and take before the younger and the heirs male of his body," are nothing more than the law would have implied; for the sons of every tenant in tail take by priority of birth and seniority of age. *Expressio eorum quæ tacite insunt nihil operatur.* Had these unnecessary words been omitted *John Poole* would clearly have taken an estate tail, notwithstanding the express limitation to him for life, with remainder to trustees. *Sayer* v. *Masterman*, *Ambl.* 344. *Wright* v. *Pearson*, *Ambl.* 358. *Austin* v. *Taylor*, *Ambl.* 376. and *Jones* v. *Morgan*, 1 *Bro. Chanc. Cas.* 206. It is clear that the testator did not intend the estate to go over so long as there should be issue of his son *John Poole*. But if the issue of *John Poole* were to take as purchasers, then if *John Poole* had had a son, and that son had died leaving a son, the estate upon the death of *John Poole* would have gone over to the daughter of the testator. The case of *Robinson* v. *Robinson*, 1 *Bur.* 38. shews the extent to which Courts will go in giving an estate tail, in order to effectuate the general intention of a testator; and also *Doe* d. *Dodson* v. *Grew*, 2 *Wils.* 322. Those two cases are recognised, and the principle upon which they proceeded was acted upon in *Doe* d. *Candler* v. *Smith*, 7 *T. R.* 531. and *Doe* d. *Cock* v. *Cooper*, 1 *East*, 229. It is remarkable, that in the subsequent devise to *Anderton Poole* for life, the testator, after the limitation to trustees to preserve contingent remainders, expressly limits the estate to the first and every other "son and sons" of the body of the said *A. Poole* in the usual manner; when therefore he wished to give an estate for life and designate the subsequent takers, it is evident that he knew how to express himself. The case of *Goodtitle* d. *Sweet* v. *Herring*, 1 *East*, 264, which may perhaps be urged as an authority against the Plaintiff, is very distinguishable from this; for the testator there employed words which very plainly shewed that he meant to use the words "heirs male of the body" in the sense of sons, and not in their usual sense; and it was therefore holden, upon the authority of *Lowe* v. *Davis*, 2 *Ld. Raym.* 1561. that as the testator had explained the meaning of the

†2 word

1804.

Poole v. Poole and Others.

word "heirs," by subsequent expressions, that word must be taken in the sense which he had assigned to it. But in the present case there are no words to denote an intention to use the words "heirs of the body" in a different sense from that which the law puts upon them. In the limitation to the second, third, and other sons, it is obvious that the words "such sons" refer to those second, third, and other sons, and not to the heirs of the body of those sons; under that part of the devise therefore those sons must have taken an estate tail; and as it cannot be contended that the limitation to the first son is to be construed differently from the limitation to the other sons, he must also take an estate tail, though the words "sons" in the plural number, which follows the limitation to him, does not seem to have any appropriate application. The expression "as the elder of such sons," &c. appears to have been inserted by some mistake in the first limitation, as one son only had been mentioned, though the same expression has an appropriate application in the limitation which follows.

Lens Serjt. *contrà*. It may be admitted as a general rule, that neither the devise of an express estate for life to the first taker, nor the interposition of a devise to trustees to preserve contingent remainders, if followed by a devise to the heirs male of the body of the first taker, will prevent him from taking an estate tail. It is not necessary therefore to comment upon any of the cases which have been cited to this point. The only question here is, Whether the words "heirs male of the body" have not been so explained by the testator that they must in this will be construed to mean first and other sons. The cases of *Lowe* v. *Davis* and *Goodtitle* v. *Herring* admit that the words "heirs male of his body," if unexplained, import an estate tail, but establish this further rule, that if the testator appear to have put a different sense upon them by using them as synonimous to son or sons, the sense so put upon them must prevail. Here the testator in his devise to his first son and the heirs male of his body applies the words "such sons" to "heirs male of his body," there being no other antecedent to which those words can be applied; he therefore considers the latter expression as synonimous with the former; and having put this sense upon it, the Court must take it in that sense. Unless therefore that part of the first devise be rejected respecting the preference of the elder to the younger sons, the Court must take the testator to have given only an estate for life to *John Poole*, with re-

mainder to his sons in succession as purchasers. Nor is there any ground upon which these words can be rejected; for before this can be done, it ought to be shewn that they are inconsistent with the rest of the will. It may be said indeed, that under the words, of devise to the second, third and other sons, those sons would take an estate tail, since the words "such sons," which follow in that devise, are not applicable to the heirs male of the body of those sons, but to the sons themselves. But it is a general rule, that where the testator has affixed a definite meaning to any particular expression, that meaning must prevail until he shews an intention to desert it. As therefore the testator has shewn an intention in the preceding clause to use the words "heirs male of the body" in the sense of sons, the same meaning must be given to the same words in this clause.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. In giving our opinion upon this case, we shall consider the several devises in the will of *James Poole* as if they had been devises of legal instead of equitable estates; in short, as if they had been to the use of the several devisees instead of being devises in trust for the several devisees, and had therefore conveyed immediate legal estates to the several persons specified. The first limitation in the will is for the use of his first son by his wife *Lucy*, begotten or to be begotten, for and during his life, then upon trust to preserve contingent remainders, and after the death of such first son, to "the several heirs male of such first son lawfully issuing, so as the elder of such *sons*, and the heirs male of his body, shall always be preferred and take before the younger and the heirs male of his body." The first part of this limitation is to the first son only of the testator for his life, not comprizing any other sons. So that the words "such sons" used in the subsequent part of the same limitation, can only apply to the heirs male of the body of his first son. The testator then proceeds to devise, for want of such issue, to his second, third, fourth, and all and every other son and sons for their respective lives, then in trust to preserve contingent remainders, and after their respective deceases, to the heirs male of their respective bodies lawfully issuing, "so as the elder of such sons, and the heirs male of his body, shall always be preferred and take before the younger of the same sons, and the heirs male of his or their body or bodies."

Now

1804. POOLE v. POOLE and Others.

Now in this second limitation it is perfectly clear that the words "such sons" can only refer to the sons of the testator, for there is nothing in that limitation to which these words can relate, except those very sons whom he had before mentioned in the plural number. This devise therefore is the same in effect as that in *Bagshaw* v. *Spencer*, 2 *Atk.* 246. 570. The testator then proceeds to the limitations in favour of his daughters, and after giving them estates for life, with remainder to trustees to preserve contingent remainders, remainder to the heirs male of the bodies of his daughters, provides that the elder of his daughters and the heirs male of her body should be preferred to the younger and the heirs male of their bodies. After some intermediate provisions respecting the estates devised, the testator, on failure of such issue as before mentioned, devises to his nephew *Thomas Poole*, then residing in the *East Indies*, for life, then to trustees to preserve contingent remainders, then to his nephew *Anderton Poole* for life, then to trustees to preserve contingent remainders, and after the death of *Anderton Poole*, to the first and every other son and sons of the body of *Anderton Poole* lawfully to be begotten, successively as they shall be in priority of birth and seniority of age, and the several heirs of their respective bodies lawfully issuing, so as the elder of such sons, and the heirs of his body shall always be preferred and take before the younger of the same sons and the heirs of his and their bodies. This limitation is followed by another precisely similar in favour of another nephew. On these latter limitations no doubt can be entertained: for the will is technically expressed so as to convey estates tail to the sons of the first takers. The distinction which arises upon the face of this will is, that the testator, after the devise to his eldest son, has added words which are improper if the devise to that son be of an estate for life; but with respect to the devise to the second, third, and other sons, the words superadded only point out the same estates as they would necessarily take under the words of the devise, namely, estates tail. In the limitations to his nephews the testator has employed the very words that a conveyancer would adopt. The difficulty arises upon the use of the words in the first limitation "so as the elder of such sons and the heirs male of his body shall always be preferred," &c. only one son having been previously mentioned. It is contended, that according to the rule which has prevailed in cases of this kind, it must be

holden

holden that the teftator meant to reftrain the general fenfe of the words "heirs male," and not to employ them as words of limitation. I will not give any opinion whether, if this claufe had ftood alone, unexplained by other parts of the will, fuch might not have been the proper conftruction. On that point the Court wifh to avoid any determination. Indeed, if this had been a fingle limitation to a ftranger, the conftruction would have depended much upon the liberality with which the Judges might be difpofed to confider it. But it appears to me, that in conftruing limitations of this fort the courts have never deviated from the general rule, which gives an eftate tail to the firft taker where the devife to him is followed by a limitation to the heirs of his body, except where the intent of the teftator has appeared fo plainly to the contrary that no one could mifunderftand it. In this cafe, however, when the limitation upon which the difficulty arifes is connected with the other limitations in which he has ufed the fame words clearly without intending that the heirs of the body fhould take by purchafe, it would be ftrange to fuppofe he intended the heirs in this limitation to take as purchafers. I take the rules refpecting the conftruction of words in wills to be plain and well fettled. Words are always to be taken in their ordinary fenfe, unlefs the teftator has demonftrated an intention to put a different fenfe upon them. Now the words employed in the firft devife are clearly, in their ordinary fenfe, words of limitation. Another rule in the conftruction of wills is, that neither an intent manifefted by the teftator to give only an eftate for life, nor the interpofition of truftees to preferve contingent remainders, nor mere words of condition defcribing the order of fucceffion in which the devifes are to take place, nor the introduction of powers of jointuring, or of liberty to commit wafte, are of themfelves fufficient to vary the technical fenfe of the words ufed. It muft plainly appear that the teftator did not mean to give fuch an eftate as would pafs under the words ufed, unlefs controuled by fuch apparent intent. My brothers agree with me in thinking, that this rule muft be rigidly obferved. In this cafe there are no circumftances to alter the meaning of the words. It is altogether unneceffary for me to examine the numerous cafes that occur in the books; particularly as they are well collected by Mr. *Fearne* in his Treatife on Contingent Remainders, by Mr. *Hargrave* in his treatife on the rule in *Shelley*'s cafe, and in the note in *Hargrave* and *Butler*'s edition of *Co. Litt.* where the rule laid down in that cafe is dif-

1804.

POOLE v. POOLE and Others.

1804.

POOLE v. POOLE and Others.

cussed. It only remains for me to apply the established rules of construction to the limitations of this case, with a view to enquire whether the words upon which the question turns are to be considered as words of purchase or not. In order to give effect to the argument for the Defendant, it would be necessary to hold that the testator meant to give a different estate to his eldest son from that which all the limitations shew that it was his intention to give to his other sons and to his daughters. It is insisted, however, that this must be the case in consequence of the particular words used by the testator in the limitation in question. It is clear that the daughters must take an estate tail, for there are no words of reference in the limitation to them by which the words "heirs male of their bodies" can be made words of purchase. Are we then to suppose that the words in question were inserted in the first limitation by design, and that they were omitted in the limitation to the daughters by mistake? It is not possible to suppose that he meant any such thing, nor have we any right to insert words which he has not used. Besides, where he limits the remainder to his nephews he says "in failure of *such* issue by me as aforesaid and not otherwise" the estate shall go over. If then the heirs male of the body of the first son must be taken to mean sons, the estate, under the strict words of this will, must go over, though such first son should leave a grandson; and yet it could scarcely have been so intended by the testator. I desire it may be observed that we rely on the words used throughout the will, whether the testator was giving to his sons, his daughters, or his nephews; and it will then be seen whether, consistently with the cases, we could put that construction upon the words in the first limitation, which the Defendant contends for. The case of *Goodtitle* v. *Herring*, which was cited on the part of the Defendant, is certainly a case of great authority, since it went up to the House of Lords. The Court, in commenting upon that case, admitted the rule to be established, since the cases of *Colson* v. *Colson* (a), and *Perring* v. *Blake*, that if an estate of freehold be given to a man, and either mediately or immediately, in any part of the same instrument an estate is limited to the heirs of his body, he would take an estate tail. But they thought that the rule was not so rigid as to preclude the testator himself from explaining the words used, and

Lord

(a) 2 *Str.* 1125. and 2 *Atk.* 246.

1804.

POOLE v. POOLE and Others.

Lord *Kenyon* cited the cafes of *Law* v. *Davis* and *Doe* v. *Laming*, where they were fo explained. The Court thought that the words "heirs of the body" might admit of explanation, and that the words there ufed were fufficiently explanatory. The cafe of *Goodright* v. *Pullyn*, 2 Ld. *Raym.* 1437. was decided by the fame Judges who decided *Law* v. *Davis*. The devife there was to *Nicholas Lifle* for life, and after his deceafe to the heirs male of the body of the faid *Nicholas*, lawfully to be begotten, and his heirs for ever; but if the faid *Nicholas* fhould happen to die without fuch heir male, then over. The Judges were unanimoufly of opinion that it was an eftate tail in *Nicholas Lifle*; and Lord *Raymond*, in reporting the decifion fays, "they all held that the operation of the plain and clear words of a fettled rule of law fhould not be defeated or broken into by uncertain or doubtful words, which they took the laft at leaft to be; but in effect the words heirs males muft be rejected to make this an eftate for life in *Nicholas*." If then the Court in that cafe would not fuffer the rule of law to be broken in upon, we could not be juftified in fo doing here where we cannot fee a plain intention to vary the conftruction which the law puts upon the words "heirs male of the body" ufed in this cafe.

The following Certificate was afterwards fent to the Lord Chancellor.

This caufe has been argued before us in the abfence of Mr. Juftice *Chambré*, who was indifpofed. We have confidered it, together with the will of *James Poole*, and are of opinion, that if the devifes contained in the faid will to the children of the teftator and their iffue had been devifes of legal eftates, *John Poole*, the only fon of the teftator, would have taken an eftate in tail male, there not appearing upon the whole will together fufficient indication of the teftator's intention to reftrain the legal effect of the words "heirs male of the body," and to convert them into words of purchafe.

ALVANLEY.
J. HEATH.
G. ROOKE.

Feb. 10th.

Smith *v.* Dickenson.

In assumpsit the Plaintiff declared on an agreement by the Defendant not to avail himself or take any undue advantage of a communication made to him by the Plaintiff, of an invention for which the Plaintiff intended to take out a patent, and assigned as a breach, that the Defendant fraudulently obtained a patent for the invention in his own name. Evidence that the Defendant fraudulently obtained a patent in his own name which the Plaintiff afterwards agreed should remain in the Defendant's name upon certain terms, which terms the Defendant before the commencement of the action had renounced, insisting upon the invention as his own, was held to maintain this breach.

If a party agree not to do some specified act under a "penalty" of 100l. such sum cannot be considered in the nature of liquidated damages.

Assumpsit. The declaration stated, that before the making of the promises, &c. the Plaintiff had contrived various articles in the business of a sadler, which he fully conceived to be new and valuable improvements; and in particular he had before then invented a certain spring apparatus for girthing saddles, and at the time of making the promises, &c. the Plaintiff was desirous of obtaining his Majesty's letters patent for the sole use and benefit of the said invention for a certain term to be specified in the said letters patent, of which the Defendant had notice, and whereas the Defendant was desirous of being made acquainted with the nature of the said invention, in consideration of the premises, and also in consideration that the Plaintiff would communicate the nature of the invention to the Defendant, the Defendant undertook that he would not avail himself or take any advantage of such communication under the penalty of 1000*l*. It then averred, that the Plaintiff, confiding in the Defendant's promise, did communicate to him the nature of the said invention, but that the Defendant, not regarding, &c. but intending to injure the Plaintiff wrongfully, &c. disclosed and made known the nature of the said invention, and obtained his Majesty's letters patent for the sole use and benefit of the said invention for the term of fourteen years, as being the invention of him the Defendant, and thereby availed himself and took an undue advantage of the communication made to him as aforesaid; whereby the Defendant became liable to pay 1000*l*. according to his agreement; yet that the Defendant had not paid, &c.

The second count was the same as the first, with the addition of an allegation that the Plaintiff sustained special damage by being prevented from taking out letters patent in his own name, and thereby lost great profit.

Plea *non assumpsit*.

The cause was tried at the *Guildhall* Sittings after *Michaelmas* Term, before Lord *Alvanley* Ch. J. when it was proved that the Plaintiff having invented the spring apparatus mentioned in the declaration, the Defendant called upon him, and expressed himself extremely desirous to be informed of the nature of the invention;

that

1804.

SMITH *v.* DICKENSON.

that the Plaintiff communicated the invention to the Defendant upon his ſigning the following agreement: " *Thomas Smith*, of No. 119, *New Bond Street*, ſadler, having contrived various articles in the above branch he fully conceives to be new and valuable improvements, Mr. *Robert Dickenſon*, of No. 55 *Long Acre*, being deſirous of being made acquainted with one of the above mentioned improvements, which Mr. *D.* fully comprehends under the title of ſpring apparatus to anſwer or produce the ſame effect as thoſe for which Mr. *Robert Dickenſon* has already obtained the King's patent, he, *Robert Dickenſon*, doth hereby promiſe and bind himſelf not to avail himſelf or take any advantage of ſuch communication under the penalty of breach of honour and 1000*l*." That the Defendant, immediately on getting this information, entered a *caveat* againſt any perſon but himſelf taking out a patent for the above invention, and ſhortly after took out a patent for it in his own name, though it had been agreed between him and the plaintiff, that they ſhould jointly ſhare the profits of the invention, but that the patent ſhould be taken out in the name of the Plaintiff. That the Defendant being unable to make out a ſpecification in order to maintain his patent, obtained another interview at a houſe in *Soho Square* with the Plaintiff, at which it was agreed that they ſhould be jointly concerned in the invention, the Plaintiff being employed to make all the ſaddles; and that the patent which had been taken out in the name of the Defendant ſhould ſtill continue in his name. That upon the faith of this agreement the Plaintiff aſſiſted in making out the ſpecification, which was duly enrolled. That the Plaintiff ſhortly after finding the Defendant was uſing the patent for his own benefit ſolely, wrote to him upon the ſubject, and received from him the following anſwer: " Sir, I am unconſcious of any contract at preſent between us, nor can Mr. *N.* or Mr. *F.* (two perſons who had been at the interview when the ſpecification was drawn out) help me to the recollection of any, although you refer me to them for that purpoſe. The two inventions for which I have obtained patents are my own inventions. Prior to my giving you a paper not to practiſe any invention you might communicate I had depoſited a drawing in the hands of a friend, and had a workman actually employed in making the article for which my laſt patent is obtained, and this drawing was depoſited for the purpoſe of proving, ſhould it be neceſſary, what

1804. Smith v. Dickenson.

my design and invention consisted of prior to any communication from you, lest even if it should be the same, I might still go on to obtain my patent. How far your invention resembled mine is of no consequence. I went on with my own. Your communication had in it nothing new, therefore I do not consider myself as using your invention but my own." Upon this case it was objected by the counsel for the Defendant, that the *gravamen* laid in the declaration did not correspond with that which was in evidence before the jury; but his Lordship refused to nonsuit the Plaintiff, and the jury found a verdict for the Plaintiff for 300*l.*, the Defendant agreeing to assign the patent to the Plaintiff for the remainder of the term at the Defendant's own expence. The Plaintiff was to be at liberty to enter a verdict for 1000*l.* if the Court should be of opinion that the sum of 1000*l.* mentioned in the agreement was in the nature of liquidated damages, and not a penalty; and if the Court should be of opinion that the Defendant had not taken an undue advantage of the Plaintiff a nonsuit was to be entered.

Accordingly a rule *nisi* for a nonsuit one the one side, and for increasing the verdict on the other, having been obtained on a former day,

Best Serjt. now contended that the *gravamen* in the declaration was supported by the evidence; for that although the Plaintiff by his conduct and his agreement at the time when he assisted in making out the specification had waved any remedy for the Plaintiff's misconduct in fraudulently obtaining the patent in his own name, yet that he had only waved it upon the condition of the Defendant's fulfilling the agreement which was entered into at that time; that the Defendant having now renounced that agreement by his letter, the Plaintiff's remedy revived for the Defendant's original misconduct in obtaining the patent in his own name. He next insisted that the sum of 1000*l.* stipulated by way of penalty was in the nature of liquidated damages, and consequently the Plaintiff was entitled to have the verdict entered for that amount.

But *The Court* expressed themselves clearly of opinion that the word "penalty" used in the agreement effectually prevented them from considering the sum mentioned as liquidated damages.

Shepherd and *Bayley* Serjts. *contrà*, urged that the Plaintiff's action could not be maintained on this Declaration, since it was evident that whatever injury he might originally have sustained by

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the Defendant's conduct, in taking out a patent, yet, that having subsequently assented to that act of the Defendant, he could not now make it the ground of an action, but ought to have declared upon the new agreement; and that in fact the Plaintiff could not sustain any damage by the mere act of the Defendant in taking out the patent in his own name, for that without the Plaintiff's subsequent assistance in making out the specification, the patent would have been of no avail.

Lord ALVANLEY, Ch. J. This is an action for the breach of an agreement; and the questions are, first, Whether the evidence proved that the Defendant took any undue advantage of the communication made to him by the Plaintiff; and secondly, Whether the advantage taken by the Defendant, supposing it to be an undue advantage, corresponds with the breach laid in the declaration? It appears that the Defendant came to the Plaintiff in order to obtain a knowledge of his invention, and was extremely anxious that some terms should be entered into between them; and at the same time he agreed not to take any undue advantage of the communication made. It was then understood that the patent was to be taken out in the name of the Plaintiff. Let us see then what was the first use which the Defendant made of his knowledge, there being at that time no contract in existence between them respecting any participation of profit in the invention. He immediately enters a *caveat*, to prevent any other person but himself from taking out a patent. This was an improper use made of the discovery, upon which the Plaintiff might have brought an action, though it is uncertain what damages he could have recovered. The Defendant then obtains a patent in his own name, but being unable to make out the specification, he tempts the Plaintiff, under pretence of offering him certain advantages, to complete the discovery. This was only a continuation of the same fraud; for as soon as he has made out his specification from the information afforded him by the Plaintiff, he refuses to execute any articles of partnership, alleging that he had obtained the patent upon a specification previously deposited in the hands of a friend. It is urged that the Plaintiff agreed to release all breach of the first agreement, not to take any undue advantage of the communication, upon the Defendant entering into certain terms, and that the Defendant is only guilty of a breach of those terms. Possibly those terms never

1804.

SMITH v. DICKENSON.

were reduced into writing, and yet the Plaintiff is called upon to wave his remedy on the first agreement, without any power of enforcing the second. It does appear to me however, that although, if there had been a formal release of the remedy under the first agreement he must have been barred, yet as the patent was allowed to remain in the name of the Defendant only, upon the performance of certain conditions, the performance of which has not been shewn, the Plaintiff may resort to the breach of the first agreement, of which the Defendant appears, by the evidence, to have been guilty. Indeed the Defendant's letter to the Plaintiff puts the question out of all doubt, for he there insists upon the invention as his own, and repudiates any subsequent agreement, and justifies having taken out the patent in his own name as for an invention of his own. If a man give a bond for the performance of covenants, and the covenants being broken, the obligee agrees not to put the bond in suit upon the undertaking of the obligor to do certain things, and then the obligor refuses to perform his undertaking, can it be said that the bond is gone? Certainly not. So in this case, the subsequent agreement was a conditional agreement, and as the conditions were not performed, the action may be maintained upon the original agreement.

HEATH J. I think the agreement upon which the declaration is founded is a subsisting agreement: and that the Defendant, by entering the *caveat*, and taking out the patent in his own name, committed a breach of that agreement, there can be no doubt. It is insisted that the Plaintiff waved the breach of this agreement, and certainly he might have done so. But I think that his conduct has been very well explained; for it appears that the Defendant, with respect to this second agreement, was practising a mere fraud upon the Plaintiff, and amusing him by a sham treaty for a partnership which he never intended to carry into effect. It would be very hard to refer the Plaintiff to the second agreement, of the terms of which there is no evidence, but only of a treaty for an agreement. It appears to me therefore that the first agreement was not waved by the treaty for the second agreement, which the Plaintiff was induced to enter into by the fraud of the Defendant.

ROOKE J. The only question is, Whether the Plaintiff, by the strict rule of law, is prevented from recovering for the breach of the

the first agreement; for there can be no doubt that the first agreement was *broken*. That fact was sufficiently proved by his entering the caveat, and taking out the patent in his own name, immediately after the disclosure of the invention; and that breach appears to me to be both well alleged and proved. It is insisted, however, that the Plaintiff must be nonsuited on the ground of the second agreement; but before the Defendant is entitled to nonsuit the Plaintiff on the ground of the second agreement he must prove that agreement, whereas his own letter disavows all agreement with the Plaintiff upon the subject of the patent, and insists upon his own right to the invention.

Rule discharged.

Feb. 13th.

The Warden and College of the Souls of all faithful People deceased of OXFORD *v.* COSTAR and Another.

Buildings of a college in one of the universities taken into and made part of the college between the passing of the first land tax act, and the act which made that tax perpetual, are exempted from the land tax. But where a college, soon after the passing of the first land tax act, purchased land of a parish under a private act of parliament, which provided that the college should pay all taxes which the premises then were, or should thereafter be subject to, it was held that the lands purchased were not exempted from the land tax.

THIS was an action of trespass, and the declaration contained three counts; the first was for seizing and carrying away, on the 1st *January* 1803, two reading desks belonging to the Plaintiffs; the second for seizing and carrying away, on the 2d *January* 1803, two chairs belonging to the Plaintiffs; and the third for seizing and carrying away two tables also belonging to the Plaintiffs; the Defendants pleaded the general issue, and the cause came on to be tried before Mr. Justice *Chambre* at the *Lent* assizes for *Oxford* 1803, when a verdict was found for the Plaintiffs with 1*s.* damages upon each count, subject to the opinion of the Court on the following case:

In the land tax assessment of the parish of *Saint Mary the Virgin* in the city of *Oxford* for the year 1798, *All Souls College* was assessed by the Commissioners of the city of *Oxford*, in the several sums of 9*l.* 14*s.* 9*d.* for certain premises called in the assessment, *All Souls Kitten Court*; 6*l.* 13*s.* 3*d.* for certain premises called late *Wards*; and 3*l.* 16*s.* 10½*d.* for about one-third of the *Warden's lodgings*. All the premises so assessed are locally situate in the city of *Oxford*.

The premises for which the College is assessed at 9*l.* 14*s.* 9*d.* formely belonged to the parish of *Saint Mary*. In the year 1715, an act of parliament passed, which, after reciting that certain feoffees of

1804. All Souls College Oxford v. Costar and Another.

of the parish of *Saint Mary* were seised of the above premises in fee simple, in trust for the use of the church and the poor of the said parish, and had demised them for certain terms and at certain yearly rents, enacted, That all the said premises should be vested, estated and settled in the Warden and College of *All Souls* and their successors for ever, to be converted to what use they should think fit, and freed and discharged from all estates, uses, trusts, agreements, conditions, powers, charges, and incumbrances whatsoever, the said Warden and College paying certain yearly rents to the use of the church and poor of the said parish, and for which a right of entry and power of distress was reserved to the feoffees. The above act of parliament contains the following clause: "And "be it further enacted, That the said Warden and College, and "their successors for ever, shall pay and discharge all taxes which "are or at any time hereafter shall be imposed upon the premises "hereby vested in them by authority of parliament." The same act also authorises the parishioners of the said parish to enter the College on Ascension-day yearly, and pass through the same to make their perambulation, and take in the bounds and limits of the said parish by the way and passage which had been for that purpose theretofore accustomed. At the time of the passing the above act, two tenements stood on part of these premises; another part thereof, being at that time an orchard, was then in lease to, and in the possession of the College. Soon after the passing of the act, the College took down the before-mentioned tenements, and erected on the premises their present library, which is contiguous to other buildings of the College within the same inclosure, and kept for the use of the College as other parts of the College are. Before and at the time of passing of the said act, these premises were assessed to the land tax in the said parish of *Saint Mary* by the commissioners of the city of *Oxford*, and since the passing of the said act, *All Souls College* has constantly been rated in the same manner, and has paid the land tax assessment for these premises up to the period of the now disputed assessment.

The premises for which the College is assessed at 6*l.* 13*s.* 3*d.* were formerly the scite of an old house in the occupation of one *Ward*, consisting of a dwelling house and other buildings, with the appurtenances adjoining to the *College of All Souls*. In 1783, the College, having purchased the fee of the said house and premises,

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1804.

All Souls College Oxford v. Costar and Another.

pulled down all the buildings, and laid part of the premises into the garden, then and still occupied by the Warden of the said College with his lodgings, and erected on a part thereof some necessary out-door offices for the use of the Warden, and a wall where the front of the said house stood towards the High-street, with a gateway therein, through which alone the Warden, to whom these premises have been allotted by the College, has since had a communication to and from the street with his stables and other back buildings of the College allotted by the College for the separate use of the Warden. The Warden's garden into which part of the premises was laid, as before-mentioned, is part of the ancient scite of the College. Previous to the year 1783, and before *Ward*'s tenement was pulled down, the wall of the same, on the west side, formed the eastern boundary of the College and of the Warden's garden coming close up to the Warden's lodgings and garden, but to prevent a communication with any houses in the High-street, and to keep the College detached from any buildings but its own, the said tenement was pulled down and laid to the College in such manner that the wall and building of the next adjoining tenement to the east of *Ward*'s premises, do now and have since the year 1783, formed the sole inclosure of the College and the said garden towards the east, being connected on the south with the Warden's lodgings by a single wall in front, in which is the gateway to the High-street aforesaid. For these premises *All Souls College* has constantly been rated to the land-tax in the said parish of *Saint Mary* by the city commissioners, as the former owners of the said premises previously were, and has paid the assessments up to the period of the now disputed assessment.

The premises for which the College is assessed at 3*l.* 16*s.* 10$\frac{1}{2}$*d.*, form about one-third part of the Warden's lodgings. By indenture of the 4th *April* 1704, between the feoffees of the parish of *Saint Peter in the East* and the *Warden and College of All Souls*, the former, after reciting a demise to themselves from the corporation of *Oxford* of a messuage or tenement (the spot on which the premises in question stand), for 99 years, and that the Warden and College had lately purchased the remainder of a term of 40 years in the messuage or tenement granted by the above-mentioned feoffees to one *Joan Fry*, with intent to pull down the same, and with the consent of the said feoffees to erect a new building in the room

1804. All Souls College, Oxford v. Coltar and Another.

thereof, to be laid to and accounted as part of the scite of the College or Mansion-house, demised the said messuage and premises to the Warden and College for the term of 90 years at a certain rent, with a clause of re-entry for non-payment thereof. In this deed there is a covenant on the part of the Warden and College, to pay the sum of 14*l.* every fourteen years for a fine, and a covenant by the feoffees to renew with the corporation of *Oxford*, and within one month after request made at any time thereafter, to demise to the Warden and College for a like term of 90 years, under the like fines, rent, and covenants. Soon after the date of the above-mentioned indenture, the College pulled down the buildings then standing on the premises hereby demised, and erected thereon a part of a dwelling house which is now and has been ever since allotted to and occupied by the Warden of the College as his lodgings, he paying no rent for the same. The remainder of the said house is built upon part of the old scite of the College, and is connected with the old buildings thereof. The fine of 14*l.* has been regularly paid every fourteen years, and on the request of the Warden and College, a new lease of 90 years has lately been granted to them under the same covenants and conditions, and under which lease they now hold the premises in question. For these premises *All Souls College* was rated to the land-tax in the parish of *Saint Mary*, by the commissioners of the city, in the year 1704 and 1705 respectively, by the description of Mrs. *West*'s house which belongs to *All Souls College*, and paid such assessment; but from that time until the now disputed assessment, the College has not been assessed to the land-tax for these premises by the city commissioners in the parish of *Saint Mary*. Separate commissioners for the land-tax are appointed for the city of *Oxford*, and the sum imposed upon the University is raised by an assessment made by the University commissioners upon the several Colleges and Halls in certain proportions settled amongst the heads of houses in respect of the said Colleges and Halls. All the premises before mentioned were situate in the parish of *Saint Mary* at the times when they came into the possession of the College, and nothing has been done to take them out of that parish, unless the facts before-mentioned can be construed to have that effect.

The Defendants, as land-tax collectors for the said parish of *Saint Mary*, after demand made upon the Plaintiffs, and refusal to

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pay the feveral fums above mentioned, regularly diftrained and took under a regular warrant of diftrefs, the feveral articles ftated in the declaration, on the feveral days therein mentioned, *viz.* the goods in the firft count mentioned for the firft mentioned rate of 9*l.* 14*s.* 9*d.*; the goods in the fecond count mentioned for the rate fecondly above mentioned of 6*l.* 13*s.* 3*d.*; and the goods in the third count mentioned for the laft mentioned rate of 3*l.* 18*s.* 10½*d.*

The counfel for the Defendants offered evidence to prove, that in the courfe of the laft century feveral houfes and other premifes fituate in the city of *Oxford*, and affeffed to the land-tax by the commiffioners of the faid city, have been purchafed by feveral colleges in *Oxford*, and added to thofe colleges, and occupied by the members thereof, in the fame manner as the premifes before mentioned are occupied with refpect to *All Souls*, and that the faid colleges are rated to the land-tax for the fame by the city commiffioners, and have conftantly paid fuch rates. But this evidence being objected to by the counfel for the Plaintiffs, was rejected by the learned judge.

The queftion for the opinion of the Court was, Whether the Plaintiffs were liable to be affeffed to the land-tax by the commiffioners of the city of *Oxford* in refpect of all, or any, and which of the premifes before mentioned? and the verdict was to be entered for the Plaintiffs or for the Defendants, upon the feveral counts in the declaration, according as the Court fhould be of opinion that the refpective affeffments before mentioned were lawful or unlawful. But if the Court fhould be of opinion that the evidence offered by the Defendants was improperly rejected, then a new trial was to be granted.

This cafe was twice argued; firft in *Eafter* Term 1803, by *Vaughan* Serjt. for the Plaintiffs, and *Beft* Serjt. for the Defendants; and fecondly in *Trinity* Term in the fame year, by *Williams* Serjt. for the former, and *Shepherd* Serjt. for the latter. The courfe of argument purfued on the part of the Plaintiffs tended to fhew, from the hiftory of the feveral land-tax acts, and the alterations in point of expreffion where the exemption in favour of colleges, halls, and hofpitals occurred, that it was the intention of the Legiflature to include within the exemption any buildings newly incorporated into colleges, and forming part of fuch colleges. The courfe of argument on the part of the Defendants tended to fhew, from the

1804.

All Souls College Oxford v. Costar and Another.

abuses to which such an exemption was liable, and from the consequent hardships which alterations in the degree of burthen thrown upon the districts responsible for such proportion of the land-tax ceasing to be paid upon lands so exempted would introduce, that it was not the intention of the Legislature to exempt any thing more than the old scites of colleges. It was also contended for the Defendants, that at all events the proviso in the private act of parliament, by which the premises assessed at 9*l.* 14*s.* 9*d.* were conveyed to the College, amounted to a covenant on the part of the College to wave their exemptions and pay the land-tax. But as these points were fully discussed in the judgment of the Court, a more detailed account of the arguments is omitted in this place.

On this day the opinion of the Court was delivered by

Lord ALVANLEY Ch. J. This case has been long before the Court; and indeed it has been our wish that the land-tax should continue to be paid by the respective parties in the same manner as it has been paid hitherto. But, notwithstanding that wish, and the hardship arising from the circumstance that the clause in the old land-tax act, upon which the question turns, has now been made perpetual, it is our duty to decide the case according to the strict letter of the law. It was not stated at the bar, but I take it for granted, that the city of *Oxford*, upon which a gross charge is made by the land-tax acts, is divided into parishes, each being as it were a district, and having a separate assessment. This, however, is not the case in all places; for every parish in the kingdom does not form a distinct district. I shall first proceed to consider those parts of the case which apply to the second and the third counts of the declaration. It is to be observed, that no acquiescence on the part of the College in the payment of any particular assessment can prevent them from availing themselves of any exemption if such exemption should be found to exist. We are to determine, therefore, how far the exemption in the land-tax acts in favour of colleges extends. We have looked into all the acts, as well as into the case of *Harrison* v. *Bulcock*, 1 *H. Bl.* 68., and we are all of opinion that the principle of *Harrison* v. *Bulcock*, is applicable to colleges as well as hospitals. In that case the premises on which the assessment was made did not form part of the old scite of the hospital; and they had been assessed to the land-tax before they were taken into the hospital. The same argu-

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ments, founded upon hardship, were there urged which have been resorted to in this case; and indeed the only difference between the two cases is, that one is the case of an hospital and the other of a college. Lord *Loughborough*, in commenting upon the words of the land-tax act, observes, "that there might be no ambiguity in the word scite, the Legislature goes on to say, *any of the buildings within the walls or limits of the said colleges, halls, and hospitals*; none of the buildings therefore within those limits are chargeable." This case appears to me decisive upon the subject: but as the present is a case of considerable importance to the universities, I think it right to enter rather more at large into the matter. In the 1 *Will. & Mar. c.* 20. which is to be found in the *Appendix* to *Ruffhead's Statutes at Large*, there is a proviso that the act shall not extend to any college or hall in either of the universities, or the colleges of *Windsor*, *Eton*, *Winton*, or *Westminster*, or any hospitals or alms-houses, or any free-school, *&c.* for or in respect of the scites of the said colleges, *&c.* or any master, fellow, or scholar of the said colleges, *&c.* for or in respect of any stipend, wages, or profits, *&c.* nor to charge any houses or lands belonging to the hospitals therein mentioned, or to any colleges or halls in either of the universities, or to any hospital, alms-house or free-school, in respect of any rents or revenues payable to the said hospitals, *&c.* applicable to the use of the poor. This act, which has been called a land-tax act, differs very materially from the present land-tax act, and rather resembles the property tax, being a charge of one shilling in the pound upon all personal estates, and one shilling in the pound upon all landed estates. The 4 *Will. & Mar. c.* 1., which is to be found in the Appendix to *Pickering's Statutes*, vol. 12. follows the 1 *Will. & Mar.* with respect to the scites of colleges and halls, but does not exempt the other lands belonging to them; and all the other land-tax acts, as far as I can collect, run in the same words, until the 11 & 12 *Will. & Mar.* which is the foundation of all the subsequent acts upon the subject. This is the first act by which the quotas of the tax are imposed upon particular districts, and in this act the exemption is extended to the buildings within the walls or limits of colleges, halls, and hospitals. The 2 *Ann. c.* 1. further extends the exemption to all lands which on the 25th *March* 1693 did belong to the scites of any colleges, *&c.* The difference of the several acts amounts to this: the first act gave an exemption from the personal tax in respect of the scites, salaries, buildings, lands,

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1804.
All Souls College Oxford v. Costar and Another.

and revenues belonging to all colleges; the 4 *Will.* & *Mar.* in respect of the scites only; the 11 & 12 *Will.* 3. in respect of the scites and buildings within the limits of colleges, &c.; and the 2 *Ann.* adds to this exemption all lands which did belong to the scites of colleges, &c. on the 25th *March* 1693. I inclined at first to think that we might put that construction upon the acts which justice seemed to require, and that we might hold that a college was not at liberty to exempt itself by enlarging its own limits. But it seems to me impossible to put so limited a construction upon the word "buildings" as to justify us in deciding that the Legislature has not given an exemption to all buildings which form part of, and are used for the purpose of the college. The words of the 2 *Ann.* which is to be found at large in *Pickering's Statutes*, vol. 23., have been followed down to the present time. Whatever, therefore, now forms part of the College, though it were not originally exempted, must, according to the case of *Harrison* v. *Bulcock*, be taken to fall within the exemption. With respect indeed to any colleges which may have been erected since the land-tax act became perpetual, I shall say nothing; but I think that a college erected after the passing of the first land-tax, and before that which rendered the tax perpetual, would be exempted. This being so, it follows that we must give judgment for the Plaintiff upon the second and third counts; and indeed with respect to that part of the tax which is the subject of the third count, there seems to be no great hardship in so doing, that part of the tax having always been paid by the parish. This circumstance of itself affords a strong proof of the construction which was put upon the 2 *Ann.* at the time when that act was passed. That act passed in 1703, and the purchase by the College of the perpetual lease from the parish of *Saint Peter's* was made in 1704. Probably indeed the parish were not aware of the clause of exemption when they entered into this contract; and the grant was made without any particular stipulation, leaving the law to operate as it might happen to apply. The consequence was, that as soon as the premises purchased were taken into, and made part of the College, the tax ceased. How sensibly the loss sustained by the parish of *Saint Peter* from this circumstance was felt, may be collected from the clause introduced into the private act of parliament in the year 1715, by which the premises which are the subject of the first count were conveyed to the College by the feoffees of the parish of *Saint Mary*. This being a private act, is,

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in the nature of a conveyance, and must be construed *secundum subjectam materiam*. About ten years before the passing of the act, the College had availed themselves of the exemption with respect to the premises then purchased. In 1715 therefore, when the parish agree to convey the premises which are the subject of the first count, they introduce a condition that the College shall pay all such taxes as then were, or should thereafter be imposed upon the premises. We are clearly of opinion that this stipulation was introduced for the express purpose of guarding against the very exemption which is now set up. It is said that the act only compels the College to pay such taxes as the premises are liable to by law when in their occupation. But we think that the intention of parliament was that the College should pay all such taxes as the premises were liable to at the time when they were purchased. Then what has been the conduct of the College? For nearly 100 years they never claimed the exemption. They were conscious that they stipulated to the contrary. We think therefore that by the proviso in the act of 1715, the college meant to charge themselves with the payment of the land-tax, and although without such proviso they might have been exempted, yet we must consider them as having renounced the benefit of that exemption, according to the maxim *quisque potest renuntiare juri pro se introducto*. On these grounds we are of opinion, that a verdict must be entered for the Defendant upon the first count, and for the Plaintiff upon the second and third counts.

Doe *ex dem.* Andrew *v.* Hutton.

Feb. 13th.

J. A. devised all his lands to S. A. (his son by the first venter) when he should come to the age of 21 years, but if he should die before 21 years, and D. A. (testator's daughter by the second venter) should be then living, he gave the same to her when she should attain 21 years. Testator died, and then S. A. died under age and without issue. Held that on the death of S. A. the inheritance vested in D. A. his sister of the half blood in preference to his uncle of the whole blood.

Ejectment to recover certain premises at *Gainsborough* in the county of *York*. On the trial at the last *York* assizes, before *Thompson* Baron, a verdict was taken for the Plaintiff, subject to the opinion of this Court, on the following case. *Joseph Andrew* being seised in fee of the premises in question, by his will, dated the 30th *December* 1779, and properly attested, devised *inter alia* as follows: "First, I will that my just debts and funeral expences

1804.

Doe *v.* Hutton.

pences be discharged, then I give and bequeath to my daughter *Deborah Andrew* the sum of 100*l.* to be paid to her when she comes to the age of 21 years, but if she should die before that she comes to the age of 21 years I give the same to my son *Stephen Andrew*; also I give to my wife *Jane Andrew*, my cow and all my household goods and furniture whatsoever; also I give and bequeath to my son *Stephen Andrew* all my lands and housing, *also all my effects whatsoever*, not otherwise disposed of in my will when he comes to the age of 21 years; but if he should die before he comes to the age of 21 years, and my daughter *Deborah* be then living, I give the same to her when she comes to the age of 21 years, also the interest of the above 100*l.* towards her maintenance until she come to the age of 21 years, provided that she should live. I do make and ordain my son *Stephen Andrew* sole executor of this my last will and testament." The devisor died on the 3d *January* 1780, without having revoked his said will, leaving *Jane Andrew* his widow, (who afterwards married *William Hutton*) the said *Stephen Andrew*, his only son by his former wife *Sarah Andrew*, his heir at law, and an infant of the age of 12 years, and the said *Deborah Andrew*, an infant of the age of three years, by his second wife *Jane Andrew*, him surviving. The personal property of the devisor (after payment of debts, funeral expences, and charges of probate, amounting altogether to 36*l.* 1*s.*) was only 15*s.* 3½*d.*, and the value of the real estate was about 300*l.* *Stephen Andrew*, upon the death of the devisor, entered into the premises in question, and afterwards died in *January* 1785, and under the age of 21 years, intestate and unmarried, leaving *Deborah*, his sister of the half blood. *Isaac Andrew*, the lessor of the Plaintiff, is the uncle and heir at law of the whole blood of *Stephen Andrew*, and is also now the heir at law of *Joseph Andrew* the devisor. Upon the death of *Stephen Andrew*, *Isaac Andrew* his uncle, entered into the possession of the premises in question, and continued to receive the rents and profits thereof during the minority of *Deborah Andrew*, who, upon her attaining the age of 21 years, was admitted into the possession and receipt of the rents and profits of the same premises, and continued in such possession and receipt until her death in 1802. *Deborah Andrew* died without issue, and after she had attained the age of 21 years, duly made and executed her will, and thereby devised the premises in question to her mother, *Jane Hutton* (formerly *Jane Andrew*) the Defendant.

The question for the opinion of the Court was, Whether the lessor of the Plaintiff was entitled to recover?

Lens Serjt. for the lessor of the Plaintiff. The first question is, Whether *Isaac Andrew*, the heir at law of the whole blood of *Stephen Andrew*, be entitled to the premises in question in preference to the devisee of *Deborah Andrew*, who was sister of the half blood to the said *Stephen Andrew*? The several devises to *Stephen Andrew* and *Deborah Andrew* not being to vest until they should respectively attain the age of 21 years, were executory devises, and until the vesting of one or other of the estates limited thereby, the fee descended to the heir at law of the devisor. Upon the death of the devisor therefore the fee descended to *Stephen Andrew*, subject indeed to be devested by the events of his or his sister *Deborah*'s attaining the age of 21. But as *Stephen Andrew* died before either of those events took place, the fee, which remained in him till his death, descended to his uncle of the whole blood *Isaac Andrew*, in preference to *Deborah Andrew* his sister of the half blood. It is true, that if a man be seised of an estate for life, and after that estate a freehold be limited to another person, and then the reversion in fee descend to the first taker, his possession will not convey the inheritance to his sister of the whole blood in preference to his brother of the half blood, for in such case it is held, that he never has the reversion in possession, and consequently the heir must claim through his ancestor and not through him. But in this case there was no reversion existing at the death of *Stephen Andrew*, since the life estates, upon which the reverson was to depend, had not then arisen. It is held, that if the heir enter on the death of his ancestor, and assign dower to the widow and die, his sister of the whole blood will only take two-thirds of the estate in preference to his brother of the half blood; and the reason of this is clear, for as the widow has a freehold estate in one third of the whole, nothing but a reversion of that third remains in him. The exceptions to the rule of *possessio fratris* have been confined to cases where an estate of freehold has been interposed between the possession of the first taker and the reversion in fee. In this case, no such estate having been interposed, the rule of *possessio fratris* must prevail, and consequently *Isaac Andrew*, the uncle of the whole blood, must take in preference to *Deborah*, the sister of the half blood. The estate indeed which descended to *Stephen Andrew*, being liable to be defeated, may possibly be called a base fee; but it

1804. Doe v. Hutton.

it may be doubted whether it ought to be so considered. There was no conveyance of a limited estate in fee; but by the operation of an executory devise, the entire fee, which descended upon the heir at law, was in a certain event to be transferred to some other person. But even supposing the estate which descended upon *Stephen Andrew* to have been no more than a base fee, the rule may still prevail; for there is no authority from which it can be inferred that the rule is confined to a fee simple absolute. Secondly, *Deborah Andrew* took only an estate for life under the will. There are no expressions from which a larger estate can be implied. The words "all my effects whatsoever not otherwise disposed of in my will," do not carry any estate in the realty. In *Hogan* d. *Wallis* v. *Jackson*, *Cowp.* 229., where the testator gave to his mother "all the residue of all the effects both real and personal which he should die possessed of," it was holden, that a fee passed to the devisee; but the addition of the word "real" plainly shewed that the testator did not mean to use the word "effects" in the usual sense, and upon that word the Court laid great stress. Independent of which they materially relied upon the introductory words there used as shewing an evident intention to convey a fee. The present case is essentially different from *Doe* d. *Chilcott* v. *White*, 1 *East*, 33., in which the testator's wife, under a power to devise what "she thought proper of her said effects" to her sisters for life, was deemed to be empowered to devise real estates; for in that case the testator had previously given her an estate for life in his realty, as well as bequeathed to her his personalty; and the Court thought the words "said effects" must refer to all the estates before given her by the same will. The case of *Camfield* v. *Gilbert*, 3 *East*, 516. is a decisive authority upon the present case. The testator there having given the "real residue and remainder of his effects wheresoever and whatsoever, and of what nature, kind, and quality soever," the Court of *King's Bench* thought that this residuary clause must be confined to personalty. Lord *Ellenborough* there said, "the principal stress is laid on the word 'effects;' but that word stands alone, and nothing is added to alter its usual signification, as in *Hogan* v. *Jackson*, where the word "real" was added together with it; but in its natural signification it means personal effects."

Bayley Serjt. for the Defendant. First, *Stephen Andrew* never was possessed of a sufficient estate in the premises to constitute him a *stipes*. There is no case or *dictum* to be found from which

which it can be inferred that the possession of any thing less than an absolute fee simple will have that effect. Now it is clear that *Stephen Andrew* never took any thing more than a base fee. For the inheritance which descended upon him at the death of his ancestor was subject to be defeated by the vesting of the executory devise to his sister. If he had attained 21, the estate which descended upon him would have ceased, and he would have taken a new estate by way of executory devise, which would either have been an estate for life, and which would have merged in the reversion, or a new estate in fee simple. But on the death of *Stephen*, the base fee ceased, and the fee simple descended to *Deborah* as heir of the devisor. It is clear from *Co. Lit.* 15. *a.* that the intervention of any estate of freehold between the possession and the absolute fee simple will prevent the possessor of the first estate from becoming a *stipes*. For it there appears that, if the father die leaving a widow, and the son enter, and take the rents and profits, yet his estate in fee simple as to one third being defeasible by the right of dower in the widow, will not descend to his sister of the whole blood in preference to his brother of the half blood, though the former will be entitled to the remaining two-thirds. [Lord *Alvanley* Ch. J. If the son die before dower be assigned to the widow, I rather think that the whole would descend to the heir of the son; though, if dower be assigned during the life of the son, the estate in dower will interrupt the seisin of the son as to one third, and turn it into a reversion.] Secondly, Under the words of the will an estate in fee passed to *Deborah Andrew*. The intention of the testator to give a fee is evident. It is clear that he meant *Deborah* to take every thing which *Stephen* would have taken if he had lived; and that if *Stephen* attained 21, he meant that he should take every thing and *Deborah* nothing. Now he could not intend to give an estate for life only to *Stephen*; for *eo instanti* that such an estate vested in *Stephen* it would have merged in the reversion in fee which descended upon him. *Stephen* therefore must, at all events, have taken a fee had he attained 21; and as the testator appears clearly to have intended to give to *Deborah* all that *Stephen* would have taken, it is hardly to be supposed that he could mean, in case of her death under 21, leaving issue, that her children should be excluded. Such then being the apparent intention, the Court will give an effect to the words used conformable to that intention, unless restrained by positive rules of law.

1804. Doe *v.* Hutton.

law. The words "all my effects whatsoever not otherwise disposed of in my will," are sufficient for this purpose. These words are at least as strong as the words "testamentary estate," which in *Smith* v. *Coffin*, 2 *H. Bl.* 444. were holden to apply to the realty, though coupled with words peculiarly applicable to personalty. In *Hogan* v. *Jackson*, it is true that the epithet "real" was added to "effects." But Lord *Mansfield* does not appear to have altogether relied upon that circumstance, and he refers to the clauses in the bankrupt laws, where the word "effects" includes every thing which can be turned into money. And the reasons assigned in the House of Lords, when that case was carried there by a writ of error, seem to shew that the judgment of the Court of *King's Bench* did not proceed on the word "real" being used.

On this day the opinion of the Court was delivered by

Lord Alvanley Ch. J. The question intended to be reserved for the opinion of the Court was, Whether, according to the true construction of the will, the testator's daughter *Deborah* would take an estate for life or an estate in fee? On reading the case it occurred to the Court that there was a preliminary point to be decided before that question could arise, *viz*, Whether the fee simple expectant on the estate for life (if it should be so considered) vested in *Stephen Andrew*, as heir of *Isaac Andrew* the son of the testator, or whether the devisee of *Deborah*, his sister of the half blood, be entitled to claim? That point the Court desired to hear argued as well as the other, and it is upon that point only that we shall now give our opinion. The question is, therefore, Whether, supposing an estate for life only to be given to the daughter, the son ever took such an estate that the reversion in fee would descend to his heir at law, or whether it would descend to the heir at law of his father? There is no rule better known in *Westminster Hall* than "that a man that claimeth as heir in fee simple to any man by descent must make himself heir to him that was last seised of the actual freehold and inheritance," *Co. Litt.* 15. *b.*, where Lord *Coke*, in commenting upon the maxim *possessio fratris de feodo simplici facit sororem esse hæredem*, says, "regularly he must make himself heir to him that was last actually seised or to the purchaser." It is necessary that this rule should be accurately understood, for there are some cases in which the ancestor need not be actually seised. If a man purchase a reversion only, he is never actually seised at [illegible] would be entitled. In [illegible], cited in

the notes to *Hargrave* and *Butler's Co. Litt.* 14. *a.* it is said "if *A.* purchases a reversion expectant on an estate for life, and dies without issue, regularly his brother of the half blood shall not be heir to him, because, though when there is a mesne seisin he ought to make himself heir to him who is last actually seised; yet, when there is not such a mesne seisin, he ought to make himself heir to him in whom it first vests by purchase." After referring to *Hodgkinsonne v. Whood, Cro. Car.* 23., where, upon a devise to *B.*, the testator's son by one venter, and the heirs male of his body, remainder to the heirs male of the body of the devisor, remainder to the devisor's right heirs, it was holden, upon the death of *B.* without issue, that *C.*, the devisor's son by another venter should take as heir male of the devisor, because it was *quasi* an estate tail; Lord *Hale* says, "But it seems that the fee shall descend to him, since it is a void devise of the fee simple, and doth not vest by purchase in the eldest son, but by descent." The same doctrine is laid down in *Jenk's* case, *Cro. Car.* 151., where the Plaintiff having declared in debt on bond against the Defendant, as brother and heir to *J. S.*, and the Defendant having pleaded *riens per descent* from his brother, it appeared that the obligor died seised, leaving issue, and that upon such issue dying without issue, the lands descended to the Defendant as heir to the son of his brother, whereupon the Court gave judgment for the Defendant, for he had nothing as immediate heir to his brother, but by descent from the son of his brother. But in the case of *Kellow v. Rowden, Carth.* 126. 3 *Mod.* 253., where *A.* being seised in fee, bound himself and his heirs in a bond, and having two sons *B.* and *C.* limited the estate to himself for life, remainder to *B.* his eldest son in tail, reversion to his own right heirs; *B.* entered and died, leaving a son *D.*, who died without issue, upon whose death the estate tail being extinct, the reversion came into possession, and descended in fee upon *C.*, it was holden in debt on bond against *C.*, as the heir of *A.*, that the declaration was proper, for though *B.* and *D.* had each of them such an interest in the fee as that they might have sold, charged, or forfeited it, yet they had not actual seisin thereof in possession, so as to be either assets in their hands, or to make a *possessio fratris* to prevent a brother of the half blood from entering; but they were seised only of the estate tail, and the father being the person who was last seised of the fee, it was sufficient to charge the Defendant as heir to him. In that case judgment was given for the

1804. DOE v. HUTTON.

Plaintiff by three judges against *Eyre* J.; and they held that it is not the reversion in fee, but the possession, which makes the party inheritable. Both these cases are noticed in my Brother *Williams*'s edition of *Saunders* in the note to *Jeffreson* v. *Morton*, vol. 2. p. 7. These, and many other cases which I shall forbear to mention, prove, that where there is an intermediate estate there is no seisin; though, as I before observed, if a man purchase a reversion expectant upon a freehold, it will descend to his heir, though it has never come into possession. I should not have consumed so much time on this part of the case if the doctrine had not been in some degree impeached by the case of *Smith* v. *Parker*, 2 *Bl.* 1230. In that case the Court of Common Pleas held, that where an intermediate tenant for life, with remainder to his first and other sons in tail being in possession of his estate for life, and having the reversion in fee in himself, subject to intermediate estates for life, with contingent limitations to the first and other sons of each tenant for life in tail, entered into a bond, and died without issue, the reversion was assets in the heir to satisfy the bond, when it vested in him in possession. My brother *Williams*, in his note to *Jeffreson* v. *Morton*, takes notice that the authority of this case was questioned by Lord *Thurlow* in *The Marchioness of Tweedale* v. *The Earl of Coventry*, 1 *Bro Ch. Cas.* 240., and that the opinion of Lord *Hardwicke*, as far as it is to be collected from the case of *Cunningham* v. *Moody*, 1 *Vez.* 174., seems also to contradict the opinion of the Court of Common Pleas. It is to be observed indeed that the case was very shortly argued, and that it does not appear to have received all that consideration from the Court which it deserved. Mr. Serjt. *Adair* merely observed, that though the remainder in fee vested in the obligor, yet being after many intermediate remainders, and three of them estates tail, it was too remote to be an actual seisin of the freehold and inheritance. I cannot help thinking, with deference to the very learned Judges by whom the case was decided, that if the matter had been more fully discussed it would have been differently determined. Lord Ch. J. *De Grey* seems to have thought that the only difficulty which could have arisen would have turned upon the question of priority, supposing all the successive tenants for life, having in them the reversion in fee, to have entered into bonds. This serves to shew in how great haste the matter was determined; for if the bond operated as a charge upon the reversion, it must have had the same

same effect in respect of priority as any other incumbrance by the person creating the charge. Mr. Justice *Blackstone*, though he agrees with the rest of the Court, takes the true distinction, for he says the obligor might have sold the reversion, and might therefore have incumbered it, though, strictly speaking, his bond was no charge upon the reversion, but only upon the heir in respect of such reversion descending. The only question ought to have been, Whether the Defendant took the reversion as heir of the obligor or not? The Court seem to have taken up the case in a wrong point of view; and Mr. Justice *N[illegible]s* almost apologised for having reserved the point. Fortified, therefore, by the opinions of Lord *Hardwicke* and Lord *Thurlow*, and after reviewing the several cases upon the subject, I feel myself compelled to deny the authority of that case. It appears to me that it cannot be supported without impeaching all the decisions which establish that the vesting of a reversion will not make such a *possessio fratris* as to convey the estate to the heir of the person in whom it vests. In *Cunningham* v. *Moody*, where the limitation was to husband and wife for their joint lives, remainder to the children of the marriage in tail, and for default of such issue, to the right heir of the husband in fee; the husband had one daughter of the marriage mentioned in the settlement, and another daughter of a second marriage, and upon the death of the first daughter without issue, the question was, Whether her sister of the half blood was entitled to the reversion in fee? Lord *Hardwicke* held, that as the reversion which descended upon the eldest sister was never clothed with possession, it was governed by the rule *possessio fratris*, *&c.* and would descend to the sister of the half blood; and he relied upon the case of *Kellow* v. *Rowden*. In *Lady Tweedale* v. *Lord Coventry*, Lord *Thurlow*, speaking of the case of *Smith* v. *Parker*, says, that the decision in that case did not so satisfy his mind as to have enabled him, had it been necessary, to decide the question respecting the reversion without referring to a Court of common law. We now come to the point in this particular case. It was urged at the bar, that admitting the doctrine laid down in the cases to which I have alluded, yet that in the present case, until the contingency happened, the fee descended on the heir at law of the testator, so that the wife of such heir would have been dowable, or the husband tenant by the curtesy, according to the case of *Buckworth* v. *Thirkell*

1804. DOE v. HUTTON.

kell(a). Admitting the doctrine of that case, if the son of the testator had married his wife would have been endowed. This case is to be found in *Collectanea Juridica*, p. 332. But we have been supplied by my Brother *Lens* with a more accurate note than the

(a) The following note was read to the Court by *Lens* Serjt. on the day after the argument.

Buckworth v. *Thirkell*, B. R. Trin. 25 Geo. 3.—This was a case reserved from the *Cambridge* assizes. The form of the action was replevin

Devise to trustees and their heirs to receive the rents and profits of a certain estate, and apply them for the maintenance of *Mary Barnes* till she arrived at the age of 21 years, or till she married; and on her arriving at such age or marrying, to the use of *Mary Barnes*, her heirs and assigns, but in case said *Mary* should die before the age of 21 years, and without leaving issue, remainder over. *Mary* married and had a child, which child died, and then *Mary* died before she arrived at the age of 21 years.

The question was, Whether *Mary*'s husband was entitled to be tenant by the curtesy.

Wood for Plaintiff. In order to make the husband tenant by the curtesy, the wife must be seised of an absolute indefeasible estate in fee simple or fee tail. In *Payne* v. *Sammes*, *Goulds*, 81. and 1 *Leon*. 167, S. C. the distinction is taken between a limitation of an estate, as where an estate tail expires for want of issues, and a condition, which in its creation is to defeat the estate on a certain contingency, and it is held that the first is subject to the tenancy by the curtesy, but otherwise of the second, for, it is said, the condition shall relate to the defeasance of the estate. In *Boothby* v. *Vernon*, 9 *Mod.* 147., the devise was to *Anne* (the heir at law) for life, and if she married and had issue male of her body living at the time of her death, then to such issue male and to his heirs for ever; but if she died leaving no issue male at the time of her death, then to *Gore Boothby* and his heirs for ever. It was held that the husband of *Anne*, she having married and had issue, could not be tenant by the curtesy, though *Anne* was heir at law, and the fee descended to her in the intermediate time, and it was said by the Court, "Wherever the estate is to be determined by express limitation or condition upon the death of the wife, there the husband shall not be tenant by the curtesy, and a case is put where a contingent estate intervening between her estate for life, and the inheritance, prevents the tenancy by the curtesy.

Whitchurch for Defendant, cited *Lit.* sec. 35 and 52. to shew that where the wife has an estate of inheritance, the husband shall be tenant by the curtesy, and if the estate exists for a moment it shall not be defeated as to this purpose by its subsequent determination. *Co. Lit.* 30. In *Boothby* v. *Vernon*, the heir male of the daughter might be considered as taking by purchase. This is a condition subsequent, and shall not defeat the privilege which has once attached; 3 *Lev.* 132. *Bro. Ab.* title, Tenant by the Curtesy, *pl.* 14. the husband is liable to the services during the life of the wife, and therefore his privilege subsists, though the estate out of which it is derived is destroyed by the death of the wife without issue.

Reply. Tenancy by the curtesy is not properly derived out of the wife's estate, for it may subsist beyond it, where by the expiration of the limitation the wife's estate is gone, but it is a privilege merely. In *Boothby* v. *Vernon* the wife had a fee till the contingency.

Lord *Mansfield*. There is no case expressly in point, let it be spoken to again.

Buller J. Is the remainder-man here heir at law? It was admitted at the bar that he was, and it was agreed to add that fact to the case.

2d Argument.

Le Blanc for Plaintiff. There has been an addition made to the case on a suggestion of the Court, which states that the devisee

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the one in print. The case is certainly very like the present. It occasioned some noise in the profession at the time it was decided; and the doctrine there laid down is very fully commented upon in the notes to *Hargrave* and *Butler's Co. Litt.* fol. 241. *a.* The reason-

DOE v. HUTTON.

over, on the death of *Mary Barnes* under 21, without leaving issue, was heir at law of the testator. I am to contend that the estate in this case taken by *Mary* the wife was a defeasible fee simple, and that to introduce a tenancy by the curtesy, there must be a fee simple or fee tail absolute and indefeasible. In *Payne* v. *Samms*, cited in the last argument 1 *Leo.* 167. *Goulds*, 81. *Anderson*, 184. the distinction is expressly made in all the reporters, and they all agree, that had the condition been broken, (which was not the case there, because the woman died within the time of performance, and so the estate tail was regularly spent), there could not have been a tenant by the curtesy. The case of *Boothby* v. *Vernon*, 9 *Mod*, 147. establishes the same doctrine, and several cases are put in the determination. The cases decided on dower, which to this purpose are the same as on the curtesy, though they differ as to the necessity of actual seisin, and in the case of trust, confirm this doctrine. 1 *Rol. Ab.* 676. tit. Dower F. and 1 *Vent.* 377. To create tenancy by the curtesy it is not barely sufficient that there shall have been issue capable of inheriting. It is not sufficient in the case of joint tenants. 2 *Ro. Ab.* 90. *Littleton*, in his definition of the curtesy says, the issue must be capable of being seised "of such estate as the wife has." Those words are material, and exclude such an estate as this where there is a condition annexed to the wife's estate only. Tenancy by the curtesy continues in the same manner as before the stat. *de donis* 2 *Inst.* 335. 8 *Co.* 356. *Bro. Ab.* 296. *Fitz.* 339. *Plow.* 241. Estates which since the stat. *de donis* have become estates tail were before estates of fee simple conditional. By the birth of issue they became absolute, and that is the reason that as to the curtesy there is no difference between estates in fee and estates tail, for by the circumstance essential to the curtesy, namely the birth of issue, there remained as to this purpose no distinction between them; for in either case it was an absolute fee on which the curtesy attached. But estates created with an express condition like the present, never became absolute. This estate was always defeasible, and was defeated by the death of the wife under the age of 21 without leaving issue.

Wilson, contrà. Executory limitations and devises were not in use at the time of the stat. *de donis*; they were not intended to alter any of the properties incident to estates and following known principles.

The estate by the curtesy is not necessarily a part of the wife's estate, for it may exist after the wife's estate has expired, but it is taken out of the whole fee simple. In 1. *Ro. Ab.* 676. the Court was equally divided, and the reason given by *Rolle* that dower must be derived out of the husband's estate, is clearly a bad one. There is no case in point on either side. In *Payne* v. *Samms*, the decision went to establish the curtesy. This is a limitation conditional, and not merely a condition, for the defeasance has no relation to the time of creating the estate, as in the case of a condition merely, the breach of which avoids all mesne incumbrances. In the report in *Leonard*, one of the cases put is this, *J. B.* if he does a particular thing is to take the estate from *J. S.* *J. S.* marries, it is there said, if *J. B.* do the particular thing required, yet the wife of *J. S.* shall be endowed. Before the stat. *de donis*, wife tenant in tail has issue and dies, the estate reverts to the donor; yet the husband will be tenant by the curtesy, and the estate does not become an absolute fee by the birth of issue. *Coke* puts a case of the wife having issue and being attainted afterwards, yet the husband is tenant by the curtesy.

Reply. Curtesy is derived out of the wife's estate, because by the birth of issue her estate becomes absolute, and it does not properly

1804.
Doe v. Hutton.

ing in that note is the reasoning of the learned editors entirely, and as such I cite it. It is there stated, as the result of various authorities, that with respect to limited fees, where the fee in its original creation is only to continue to a certain period, the wife is to hold her dower and the husband his curtesy after the expiration of the period to which the fee charged with the dower or curtesy is to continue; but that where the fee is originally devised in words importing a fee simple, or fee tail absolute or unconditional, but by subsequent words is made determinable upon some particular event, there, if that particular event happens, the wife's dower and the husband's curtesy cease with the estate to which it is annexed. It is not necessary for me to enter into an examination of the several cases referred to in this note. The observations there made are certainly worthy of attention; but we do not feel ourselves

properly subsist after the extinction of the wife's estate. This estate was conditional, and never turned into a fee simple. The case put by *Leon.* cannot be law, for if it were, the wife of every mortgagee would be entitled to dower in the mortgage estate.

Lord *Mansfield*. Tenancy by the curtesy existed before the stat. *de donis*, and the definition of it is, that the wife must be seised of an estate of inheritance, which by possibility her issue by the husband may inherit, and there must be issue born. Estates at that time were of two sorts, conditional or absolute, and curtesy applied to both equally. I cannot agree with the argument, that on performance of the condition by birth of a child the estate became absolute; it was so by a subtilty in odium of perpetuity, and for the special purpose of alienation but for no other. It otherwise reverted to the donor on failure of the issue according to the original restriction. At common law the only modification of estates was by condition. The statute of uses introduced a greater latitude of qualification, but there arose a great dread of letting in perpetuities by means of the extensive operation of that statute, and in the time of *Eliz.* and *James*, many cases were decided with a view to prevent that effect; with this view it was allowed to bar contingent remainders before the person who was to take came into *esse*; others were held to be too remote in their creation. The cases proceeded in that view too far, and estates were too much loosened, and it became necessary to restrain them again; and in the time of the troubles, eminent lawyers who were then chamber counsel, devised methods which on their return to *Westminster Hall* they put in practice, such as interposing trustees to preserve contingent remainders. It is not of long date that the rules now in use have been established. I remember the introduction of the rule which prescribes the time in which executory devises must take effect to be a life or lives in being, and 21 years afterwards. It is contended that this is a conditional limitation. It is not so, but a contingent limitation, all the cases cited go upon the distinction of their being conditions and not limitations. During the life of the wife she continued seised of a fee simple to which her issue might by possibility inherit. I am of opinion, that the Defendant is entitled to be tenant by the curtesy.

The rest of the Court assenting, Judgment for the Defendant.

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here bound to enter into the questions respecting curtesy and dower, or to give any opinion upon the case decided in the *King's Bench*, from which we are all of opinion that the present case is very distinguishable. Here the lessor of the Plaintiff claims as heir to the son of the testator; but of what estate does he claim to be heir? Does he claim to be heir of a fee simple absolute? His title accrued at the time of the death of his ancestor, that is the son of the testator. No fee simple absolute descended upon him as such heir, but merely a reversion expectant on an estate for life. Now where was the seisin of the son? It is said that he had once a fee in him, and if so, why did it not descend to his heir? But it must be admitted that the son did not die actually seised of a fee simple absolute, but only of a reversion expectant on an estate for life. As to the case of dower, I admit that the whole estate descends upon the son till assignment of dower; but when dower is assigned, the fee at the death of the wife shall descend to the heir of the father, and not to the heir of the son, for the moment that dower is assigned it is the same as if the wife had taken a life estate at the death of her husband, and the son becomes only entitled to a reversion in that third part, which will not descend to his sister of the whole blood in preference to his brother of the half blood, for though he once had possession of the whole fee simple, his actual seisin was defeated by the assignment of dower. This appears from *Co. Litt.* 15. *a.*; and in *Co. Litt.* 31. *a.*, it is said, that if there be grand-father, father, and son, and the grand-father be seised of three acres in fee, and taketh wife and dieth, and the land descendeth to the father and the father dieth, and the wife of the grand-father is endowed of one acre and dieth, the wife of the father shall be endowed only of the two acres residue; for the dower of the grand-mother is paramount the title of the wife of the father, and the seisin of the father which descended to him (be it in law or actual) is defeated, and the father had but a reversion expectant on a freehold. The result of this case I take to be, that the father was seised in fee subject to the dower of the grand-mother, and was in the same situation as the son of the testator in this case until the contingency happened; and it appears to me decisive of the present case. The case of *Goodright* v. *Searle*, 2 *Wilf.* 29. also appears to me to be in point. In that case *George Paynter* devised to his son in fee, but if he happened to die before 21, leaving no issue, to the testator's mother *Catherine Paynter* in fee. The testator died

died in 1750, leaving *George* his only son; *Catherine* died 5th *Jan.* in 1754. *George*, the son of the testator, who was also grandson and heir of *Catherine*, died 6th *Jan.* 1754, before 21, and without issue. The lessor of the Plaintiff was cousin and heir to *George* the son; the wife of the Defendant was sister and heir of *Catherine*, and cousin and heir of *George* on the part of *Catherine*. The question was, Of what estate *George* the son died seised; whether of the base fee which descended to him from his father, or of the possibility which descended to him from his grandmother? If of the former, his heir *ex parte paterna* would be entitled; if of the latter, his heir on the part of his grand-mother. It was contended, that upon the death of the testator the fee descended upon the son, notwithstanding the conditional devise to him; that upon the death of *Catherine* her interest also descended upon him, and merged in his greater estate which he had by descent from his father, and that therefore his ~~father~~ heir *ex parte paterna* was entitled. After the first argument, Lord Ch. J. *Willes*, Mr. Justice *Clive*, and Mr. Justice *Birch* intimated their opinions that the fee simple did not descend to the son upon the death of the testator, but was only devised to him upon condition; and that as the condition upon which he was to take never happened, the heir of *Catherine*, to whom it was devised over in fee, was entitled, according to the rule adopted in *Goodright* d. *Gurnall* v. *Wood*, *Willes*, 211., that the heir of an executory devisee in fee shall take though the devisee die before the contingency happen. Mr. Justice *Bathurst*, however entertaining some doubts, the case was argued again, and after the second argument it appears that the Court were all agreed, and the Chief Justice was ready to deliver their opinion in favour of the Defendant, though he deferred it in order to give an opportunity to compromise the matter. If, therefore, we are to consider the expression of the Judges after the first argument as the opinion of the Court, the case is an express authority in point; for there, although the estate in fee descended upon the son until the contingency, it was holden not to be that sort of fee which would descend to his heir *ex parte paterna*. The comment of Mr. *Fearne*, in his Treatise on Contingent Remainders and Executory Devises, vol. 2. p. 449., appears to me to be very well warranted, and we cannot better express our reason why in the present case the estate descended to the sister of the half blood, and not to the uncle of the

whole blood, than by adopting his expreſſion. "This," he ſays, "is agreeable to that rule of deſcent which requires that a perſon who claims a fee ſimple by deſcent from one who was the firſt purchaſer of the reverſion or remainder expectant on a freehold eſtate, muſt make himſelf heir to ſuch purchaſer at the time when that reverſion or remainder falls into poſſeſſion. So here the intereſt of *Catherine Paynter* was future, ſhe had no ſeiſin of the freehold; and therefore the perſon claiming by deſcent from her, muſt, by analogy to the above rule be heir at law to her when the eſtate fell into poſſeſſion. And as to the queſtion ſtarted in that caſe, Whether this executory intereſt did not, by the deſcent of it from *Catherine Paynter* at her deceaſe upon *George*, who was then her heir at law, become merged in the fee which he took by deſcent from his father (the teſtator), it vaniſhes when we conſider that the executory fee deviſed to the mother could have no exiſtence before the deceaſe of the ſon under age without iſſue; for upon that event only could it ariſe. Now how was it poſſible for it to merge before it had any exiſtence? If it could be extinguiſhed by merger it muſt be by its union with a greater eſtate, out of which it was to ariſe, and of which it might be conſidered as part, or at leaſt as an extraction. But how are two eſtates to unite, or one to become blended, or confounded with, or abſorbed in the other, when both are of equal meaſure, *viz.* both fee ſimples; and of which the one cannot commence or partake of exiſtence at all, but in an event which deſtroys and annihilates the other?" The rule is alſo well ſtated in *Watkins's Law of Deſcents*, chap. 3. ſ. 2. He firſt obſerves that, "when a reverſion, or remainder expectant upon an eſtate of freehold continues in a courſe of deſcent, it continually devolves on the death of each particular heir to the perſon who can *then* make himſelf heir to the donor or purchaſer, without any regard to the very heir of the precedent perſon who ſucceeded to it by deſcent; till when the particular eſtate is determined it ultimately veſts in poſſeſſion in him who at ſuch determination is the right heir of ſuch donor, purchaſer, or original remainder-man. For as there was no intermediate perſon actually ſeiſed of ſuch reverſion or remainder, no one could be the mean of turning its deſcent and becoming a new ſtock or *terminus*; but ſuch ſtock muſt yet be in the donor, purchaſer, or remainderman, and muſt ſo continue, if no alienation be made, till ſuch eſtate

1804. Doe v. Hutton.

ſhall become veſted in poſſeſſion." He afterwards adds, "So alſo with reſpect to contingencies and executory deviſes. Thus on a deviſe to *G.* in fee; but if he happened to die under the age of 21 years, leaving no iſſue, then to *P.* in fee; after the deceaſe of the teſtator *P.* died in the lifetime of *G.*, who afterwards died under the age of 21, and without iſſue; it was held, that the lands veſted in *P*'s. heir at law, upon the happening of the contingency, (*viz.* on the death of *G.* under age, and without iſſue,) but that the intereſt, while it was contingent, did not ſo attach in *G.* who was heir at law to *P.* on her deceaſe as to carry it on his death to his heir at law, who was not heir at law to *P.*, but that it veſted in that perſon who was heir at law to *P.* (the firſt purchaſer) at the time of the firſt contingency happening." On the whole, we think that it appears clearly, notwithſtanding the caſe of *Buckworth* v. *Thirkell*, that *Stephen Andrew* did not die ſeized of ſuch an eſtate in fee as would deſcend upon his heir of the whole blood, but only of an eſtate expectant upon the life eſtate of his ſiſter. This being the caſe, it is not neceſſary for us to give an opinion upon the ſecond point.

Judgment for the Defendant.

Lord Alvanley Ch. J. afterwards noticed a miſtake in the report of *Jenkins* d. *Harris* v. *Pritchard*, 2 *Wilſ.* 45., which caſe is there ſaid to have been determined in favour of the Defendants, whereas all the reaſoning ſhews that it muſt have been determined in favour of the leſſors of the Plaintiffs.

[Mr. Juſtice *Chambre* was abſent during the whole of this term from indiſpoſition.]

END OF HILARY TERM.

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INDEX

TO THE

PRINCIPAL MATTERS

Contained in this Volume.

INDEX TO THE PRINCIPAL MATTERS

BOND.

2. If

The

ation

 under

2. If

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PENALTY.

POST OFFICE.

PRACTICE.

BANK-

1. Notice having been given of executing a writ of inquiry on "*Tuesday* the 14th day of *Jan.* instant," when the 14th of *January* fell on a *Thursday*, and on which day the writ of inquiry was executed; the Court of *C. B.* refused to set aside the execution of the writ of inquiry for this irregularity, but rejected "*Tuesday*" as surplusage, it appearing that the Defendant was not misled thereby. *Hutten* v. *Harrison*, *H.* 42 *Geo.* 3. *Page* 1

2. After plea pleaded the venue cannot be changed. *Talmash* v. *Penner*, *H.* 42 *Geo.* 3. 12

3. But if the Defendant plead pending a rule *nisi* for changing the venue, the Court will notwithstanding allow him to change the venue. *ib.*

4. All arguments upon demurrers and other arguments in this Court are to be heard on *Mondays* and *Thursdays* only. *Regula Generalis*, *H.* 42 *Geo.* 3. 110

5. If an appearance be entered in the name of an agent to the attorney for the Defendant, and the plea be delivered in the name of the attorney, and the Plaintiff thereupon enter up judgment for want of a plea, the Court will set aside that judgment for irregularity. *Buckler* v. *Rawlins*, *E.* 42 *Geo.* 3. 111

6. The judgment in an original action, and the judgments in the actions against the bail, may be set aside upon one motion, and one affidavit entitled in the original action. *Winder* v. *Wood*, *E.* 42 *Geo.* 3. 118

7. A rule for an attachment against the sheriff for not bringing in the body, having been obtained on the 19th of *November*, and the attachment not sued out and served on the sheriff until the 9th *March* following, the Court held the sheriff discharged, and set the attachment aside. *Rex* v. *Perring*, *E.* 42 *Geo.* 3. *Page* 151

8. In *C. B.* a plea of bankruptcy must be signed by a Serjeant. *Pitcher* v. *Martin*, *E.* 42 *Geo.* 3. 171

9. If a declaration in debt demand 2000*l.* and contain several counts, each of which states a debt of 224*l.* 7*s.* 4½*d.* and the Defendant plead thereto that he does not owe the said sum of 224*l.* 7*s.* 4½*d.*, the Plaintiff may sign judgment for want of a plea. *Macdonnell* v. *Macdonnell*, *T.* 42 *Geo.* 3. 174

10. A summons for further time to plead not attended by the party taking it out, does not wave the necessity of a rule to plead. *Decker* v. *Shedden*, *T.* 42 *Geo.* 3. 180

11. If a Plaintiff having taken an assignment of the bail bond while the action is pending, proceed upon it after the cause is out of Court, the proceedings cannot be set aside for irregularity. *Pigott* v. *Truste*, *M.* 43 *Geo.* 3. 221

12. But the Court will stay such proceedings if it appear that the Plaintiff has been guilty of laches. *ib.*

13. If *A.* being arrested by *B.* on process of the Common Pleas, give bail to the sheriff, and before the return of the writ, being again arrested by *C.* is committed to the Fleet prison, after which, and before the return of the first writ, *B.* takes an assignment of the bail bond and proceeds thereon, the Court will stay such proceedings, but will not make *B.* pay costs, for they will not try upon affidavit, whether he knew or not that *A.* was in custody, but will consider him ignorant of that fact unless notice of surrender has been regularly given. *Harding* v. *Hennem*, *M.* 43 *Geo.* 3. 232

14. If a verdict for a Plaintiff be taken at *nisi prius*, subject to the award of an arbitrator, and the rule of reference be made a rule of Court, the verdict may be entered according to the award of the arbitrator, without any application to the Court for that purpose. *Burrowdale* v. *Hitchener*, *M.* 43 *Geo.* 3. 244

PRESENTATION,

PRIZE.

PRISON BOOKS,

PROCEEDINGS, STAYING AND SETTING ASIDE,

PROCESS,

PROMISSORY NOTES,

 ral

2. But

STATUTES CITED OR COMMENTED UPON,

HEN. III.

EDW. I.

HEN. VI.

HEN. VIII.

EDW. VI.

ELIZ.

JAC. I.

CAR. II.

WILL. AND MARY,

WILL. III.

ANNE.

GEO. I.

GEO. II.

STAYING AND SETTING ASIDE PROCEEDINGS.

1. If *A.* and *B.* having recovered in feparate actions for libels againft different parties engaged in the management and publication of the fame newfpapers, commence frefh actions againft the fame parties, each fuing that party againft whom the other has recovered, the Court will not interfere in a fummary way to fet afide the latter proceedings. *Martin* v. *Kennedy*, *H.* 40 *Geo.* 3. 69
2. The Court will not ftay proceedings in an action, on the ground of a bill depending in Chancery for the fame caufe. *Murphy* v. *Cadell*, *E.* 40 *Geo.* 3. 137
3. When only two of three joint contractors are fued, the Court will not ftay proceedings upon the bail bond, unlefs the defendants undertake not to plead in abatement. *Govett* v. *Johnfon*, *T.* 41 *Geo.* 3. 465
4. The Court will not fet afide proceedings, and order the bail bond to be delivered up, becaufe a Defendant has been arrefted on a fpecial *capias*, in which, as well as in the affidavit to hold to bail the initials only of his Chriftian name were inferted. *Howell* v. *Coleman*, *T.* 41 *Geo.* 3. 466

STOCK-JOBBING.

See PLEADING, 14, 15.

STOPPAGE IN TRANSITU.

A. living at *N.* in *Devonfhire*, ordered goods of *B.* in *London*, who fent them by fhip to *Exeter*, configned to *A.*, and advifed him thereof; on their arrival at *Exeter* they were delivered to *C.* a wharfinger, who received them on *A.*'s account and paid the freight and charges; after their arrival *A.* wrote to *B.* informing him that in confequence of his affairs being deranged he fhould not take the goods, and telling him that they were at *Exeter*; at this time *A.* had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt; *B.* applied to *C.* for the goods, and tendered him the freight and charges due, upon which *C.* promifed not to deliver them out of his cuftody, but afterwards did deliver them to the affignees of *A.* though indemnified by *B.*: Held, 1ft. that *B.* had a right to ftop the goods in the hands of *C.*; and, 2dly, that he might maintain trover for them againft *C.* *Mills* v. *Ball*, *T.* 41 *Geo.* 3. Page 457

SUGGESTION.

See COURTS, 1.

SUPERSEDEAS.

See PRACTICE, 25.

SURETY.

See CONTRIBUTION.

T

TENDER.

Bank notes are not made legal tender by the 37 *Geo.* 3. *c.* 45. *Grigby* v. *Oakes*, *M.* 42 *Geo.* 3. 526

TIME.

In a penal action a *capias ad refpondendum*, iffued within a year after the offence committed, but was never ferved on the Defendant or returned; after the expiration of the year, but in the fame term a *capias per conti-*

charged

STATUTES CITED OR COMMENTED UPON.

37. *c.* 73.

THE END OF THE THIRD VOLUME.

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